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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 504

THE UNITED STATES, PETITIONER

vs.

DOUGLAS CLYDE MACINTOSH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 7, 1930.
CERTIORARI GRANTED NOVEMBER 24, 1930

(35426)

SUPREME COURT OF THE UNITED STATES

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Form 2202
U. S. DEPARTMENT OF LABOR
NATURALIZATION SERVICE

No. 12712

UNITED STATES OF AMERICA

DECLARATION OF INTENTION

☞ Invalid for all purposes seven years after the date hereof

DISTRICT OF CONNECTICUT
COUNTY OF NEW HAVEN } ss:

In the UNITED STATES DISTRICT Court of DISTRICT OF CONNECTICUT

I, DOUGLAS CLYDE MACINTOSH, aged 40 years, occupation Professor - Yale University, do declare on oath that my personal description is: Color WHITE, complexion fair, height 5 feet 7½ inches, weight 150 pounds, color of hair brown & grey, color of eyes hazel, other visible distinctive marks NONE

I was born in Brookdalbane, Ontario, Canada

on the 18th day of February, anno Domini 1877; I now reside at Corner Elm and College Sts., New Haven, Connecticut

(Give number, street, city or town, and State)

I emigrated to the United States of America from Liverpool

on the vessel ST. PAUL; my last foreign residence was Monks Horton, England; I am not married; the name of my {wife / husband} is ; {she / he} was born at

and now resides at

It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to GEORGE V, KING OF GREAT BRITAIN AND IRELAND

of whom I am now a subject; I arrived at the port of NEW YORK in the State of NEW YORK, on or about the 1st day of November, anno Domini 1916; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein: SO HELP ME GOD.

DOUGLAS CLYDE MACINTOSH
(Original signature of declarant)

Subscribed and sworn to before me in the office of the Clerk of said Court this 16th day of February, anno Domini 1918.

{SEAL}

O. E. FICKETT
Clerk of the UNITED STATES DISTRICT Court

No. 12712

By D. GOLDBERG, Deputy Clerk.

IMPORTANT NOTICE TO APPLICANT.—It is VERY IMPORTANT that this Form be CAREFULLY AND COMPLETELY FILLED IN. When filled in or made it and your "FINAL PAPERS" to the NATURALIZATION EXAMINER'S ADDRESS given below.

PRELIMINARY FORM FOR PETITION FOR NATURALIZATION 5/19/29

DO NOT BE FILLED IN BY ALIEN

U.S. DEPARTMENT OF LABOR
NATURALIZATION SERVICE

This form is NOT a petition, but is used to obtain essential information, which must be furnished by the applicant BEFORE a petition may be filed.

FEE.—Need no fee to be collected by the Bureau of Naturalization.

Form 2224
Filed 5/19/29

TO THE ALIEN: Fill in all the blanks in this form. Be sure the information is correct. When completed, take or mail it to the Naturalization Examiner and he will furnish you instructions. Bring your Declaration of Intention with this form.

Take or mail this to—

THE UNITED STATES NATURALIZATION EXAMINER,
307 Federal Building, New Haven, Ct.

I desire to petition for naturalization in the New Haven, Connecticut Court at New Haven (City) or New Haven P.O. Bldg. New Haven, Conn. (State) The following information is furnished that you may arrange for my preliminary examination, and that the necessary papers may be sent to the Clerk of Court.

My full, true, and correct name is [Mr. / Mrs. / Miss] Douglas Clyde Macintosh

I have NEVER used another name / at one time I spelled the surname Mc Intosh (If has ever used any other name, give it.)

I used that name because my father spelled his name that way

The name on my citizenship ticket was Douglas Clyde Macintosh (I suppose; perhaps only initials.)

My mother's maiden name was Elizabeth Charlotte Averell

1. My present address is Edwards Hall, Yale University and New Haven. (City or town) (County) (State)
My past address is 2115 Yale Station, New Haven, Conn. (Number and street) (City or town) (County) (State)

2. My present occupation is Professor of Theology, Yale University

3. I was born on February 18,1877 at Brandalbane, ont., Canada (Month) (Day) (Year) (City or town) (County)

4. (a) The place where I last left the city or town which landed me in the United States was Southampton, England

on November 1st 1916 (Month) (Day) (Year)

(b) I landed in the United States at New York on November 18 1916 (Month) (Day) (Year)

(c) The name of the city or railroad on which I came was St. Paul

(d) If by ship: Name of citizenship then was American I came by [ ] or [ ] Iowa class boat, I think.

(e) I entered as (passenger, emigrant, citizenship seaman, or otherwise) Passenger

(f) The person in the United States I was coming to was Yale University, where I was Professor

(g) The place in the United States I was going to was New Haven

(h) The names of some of the persons or passengers I traveled with were Mr. Ross and family of Scotland.

(i) I purchased the ticket on which I came to this country at London, I think.
It was purchased by Myself.
(Name) (Location)

If you came from or through Canada or Mexico, also fill in items (A) to (F), inclusive.

(A) The place in Canada where I landed was _____ on _____ (Month) (Day) (Year)

(B) The place in (Canada / Mexico) from which I entered the United States was _____

(C) On _____ (Month) (Day) (Year)

(D) The place where I was examined for admission into the United States was _____

(E) If not examined, state why, and give the circumstances of your entry _____

(F) The place in (Canada / Mexico) where I bought my railroad ticket to come to the United States was _____

9

(If you came to the United States on visa, not to stay, please go over, and give data.)

2. (a) The date of my Declaration (first paper) of February 18, 1925.

(b) It was made in the New Haven Pl. Co. Court, located at New Haven, Conn.

(This city or town) (County) (State)

3. (a) I am _____ married. My (wife's / husband's) name is Rose Conklin MacIntosh

(b) (I / She) was born April 28, 1887 at Dowagiac Mich., U.S.A.

(Month) (Day) (Year) (City or town) (State) (Country)

(c) And now resides at 88 Woodland St., New Haven Conn.

(Number and street) (City or town) (State)

(d) We were married on July 1, 1915

(Month) (Day) (Year)

4. (a) I have ___Two___ children. (Do the following blanks write name, date and place of birth, and residence of each child)

_____ born _____ day of _____, 19__, at _____

resides at _____

_____ born _____ day of _____, 19__, at _____

resides at _____

_____ born _____ day of _____, 19__, at _____

resides at _____

_____ born _____ day of _____, 19__, at _____

resides at _____

_____ born _____ day of _____, 19__, at _____

resides at _____

(b) If not here, have you ever been married? _____ Are you divorced? _____

5. The foreign country of which I am now a subject or citizen is Canada.

6. I am _____ years old. Height _____

7. (a) I have resided continuously in the United States since 18 November 1916, except for service in (Date) Y.M.C.A. Sweden in 1918 and

(b) I have resided continuously in the State where I now live since 18 November 1916 brief trips to Canada

(Date) (Day) (Year)

10. I have ___not___ previously made petition for naturalization (second paper). That is was made to the _____ (Name of court)

Court at _____ (City or town) (State) on _____ (Date) and was not granted because

_____

11. If you wish to have your name changed, give full name you desire _____

12. Give names, occupations, and addresses of the two citizens you expect to use as witnesses. (If either witness is foreign-born, he must bring proof of citizenship.) These witnesses must have personal knowledge of your residence in the State or Nation, and of your good character, and must appear with you for examination.

(a) John C. Archer (Name) Professor (Occupation) New Haven, Conn. (Address)

(b) Dexter M. Fiennes (Name) Professor (Occupation) New Haven, Conn. (Address)

If applicant is a married woman, answer the following:

My husband was _____ naturalized on _____ (Month) (Day) (Year) at _____ (Place) (State)

Sub. Geo. A. Dalzell. Professor New Haven, Conn.

My first entry was in the fall of 1904, to attend the University of Chicago as a Graduate Student. I returned to Canada in 1907 and was a resident there till 1909, when I came to New Haven. There was some trouble about finding any record of my entry in 1909, so I am putting the date of entry as 1916, when I returned to the United States from service as a Chaplain in the Canadian Army in England and France.

D. C. MacIntosh.

32. Sign your full and correct name in your own handwriting: DOUGLAS CLYDE MACINTOSH

Sign name you are now using: DOUGLAS CLYDE MACINTOSH

34. (a) In what place in the United States did you meet for the first time the first witness named? New Haven (City or town)

New Haven, Conn. (County) (State) On what date? Sept. or Oct. 1909. (Month) (Day) (Year)

(b) How often did you see this witness each month during the five years just before the date of this statement? (Almost every day except in the summer.)

At what places? Edwards Hall, Yale Univ.

35. (a) In what place in the United States did you meet for the first time the second witness named? New Haven. (City or town)

New Haven, Conn. (County) (State) On what date? I am not sure; before 1916. (Month) (Day) (Year)

(b) How often did you see this witness each month during the five years just before the date of this statement? About twice a month or oftener.

At what places? First Baptist Church, Yale Graduates' Club, and at his home.

36. (a) Have you been absent from the United States since the day you have before stated for your arrival? Yes.

If so, state month and year you left May 1918; month and year you returned Dec. 1918.

To what country did you go? France and England What was your reason for going? YMCA army service. I have also gone to Canada about once a year for about a week sometime during the last 10 years to lecture on my writing and visit

(b) In what places in the United States have you resided since your arrival? (Give places in chronological order, beginning and ending of residence.)

Place. (City or town)	(State)	From (Month and year)	to (Month and year)
New Haven,	Conn.	Nov. 1916	July 1927

37. What were the names and addresses of your employers during the five years prior to the date of this statement?

(Employer's name)	(State)	(No. and street)	(City)	(State)
Yale University (continuously)			New Haven,	Conn.

18. Do you understand the principles of government of the United States? Fairly well, I think.

19. Do you fully believe in the form of government of the United States? In a general way, yes.

20. Have you read the following oath of allegiance? Yes.

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to _____, of whom I have heretofore been a subject; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same."

Are you willing to take this oath in becoming a citizen? Yes.

21. Are you a believer in the practice of polygamy? No. Are you a believer in anarchy? No.

Do you belong to any organization which teaches or advocates anarchy or the overthrow of existing civil government in this country? No.

22. If necessary, are you willing to take up arms in defense of this country? Yes, but I should want to be free to judge of the necessity.

23. Did you file a questionnaire with a draft board during the war? No. If so, answer the following: Date filed _____ In _____ Address at that time _____

Address of draft board _____ Board division No. _____

Your order No. _____ Your serial No. _____ Class in which you were placed _____

Division _____ Date of classification _____ Did you claim exemption because you were an alien? No For any other reason? No Why? The question never came up.

24. Have you ever been arrested? No. Have you ever been charged with a violation of the prohibition law or any other law of the United States, or State, or of any city ordinance? No. If so, give particulars _____

25. Have you ever been an inmate of an insane asylum? No Have you ever been dependent upon public charity? No.

26. Did you yourself fill out this form? Yes. If not, who filled out this form for you? _____

27. I paid head tax and was inspected for admission into the United States at _____, on _____

I, the undersigned, having carefully read the questions herein, certify on honor that my answers thereto are true.

(Sign name in full) DOUGLAS CLYDE MACINTOSH
(Applicant)

Date July 7th, 1927 3115 Yale Station, New Haven, Conn.
(Post office address) (City) (State)

Form 145

CERTIFICATE OF ARRIVAL - FOR NATURALIZATION PURPOSES

(This certificate is for the use of the person applying for it only, and is issued for naturalization purposes in compliance with the Act of June 29, 1906, sec. 4, subd. 2, par. 4, requiring a certificate from the Department of Labor stating the date, place, and manner of arrival in the United States.)

U. S. DEPARTMENT OF LABOR

Bureau of Naturalization

Certificate of Arrival Division

Ellis Island, New York

OCT 1 - 1927

This is to certify that the following-named alien arrived in the United States on the date and in the manner described below, at Ellis Island, New York.

Name of alien: Macintosh, Douglas C.
Date of arrival for permanent admission: November 12, 1916

Manner of arrival: St. Paul

By Direction of the Secretary of Labor:

RAYMOND F. CRIST

Commissioner of Naturalization.

Issue No. 444662

AFFIDAVITS OF PETITIONER AND WITNESSES

Form 2204-2

U. S. DEPARTMENT OF LABOR
NATURALIZATION SERVICE

ORIGINAL

No. 9886

UNITED STATES OF AMERICA

PETITION FOR NATURALIZATION

To the Honorable the United States Dist Court of District of Connecticut at New Haven

The petition of DOUGLAS CLYDE MACINTOSH hereby filed, respectfully sheweth:

First. My place of residence is Edwards Hall, Yale University, New Haven, Conn. (2115 Yale Station)
(Give number, street, city or town, and State)

Second. My occupation is Professor of Theology

Third. I was born on the 18th day of February anno Domini 1877 at Brandalbane, Ontatio, Canada

Fourth. I emigrated to the United States from Southampton, England on or about the 1st day of November anno Domini 1916, and arrived in the United States, at the port of New York on the 12th day of November anno Domini 1916, on the vessel St. Paul
(If the alien arrived otherwise than by vessel, the character of conveyance or name of transportation company should be given.)

Fifth. I declared my intention to become a citizen of the United States on the 18th day of February 1925. at New Haven, Conn. to the U. S. District Court of District of Connecticut

Sixth. I am ____ married. My {wife's / husband's} name is Hope ____, {she / he} was born on the 25th day of April 1867 at Dowagiac, Michigan, and now resides at said New Haven, Connecticut.
(Give number, street, city or town, and State)

I have no children, and the name, date, and place of birth, and place of residence of each of said children is as follows:

Seventh. I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to George V, by the Grace of God, of G.B. Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, of whom at this time I am a subject, and it is my intention to reside permanently in the United States.

Eighth. I am able to speak the English language.

Ninth. I have resided continuously in the United States of America for the term of five years at least immediately preceding the date of this petition, to wit, since the 12th day of November, anno Domini 916, and in the State of Connecticut continuously next preceding the date of this petition, since the 12th day of November, anno Domini 916, being a residence within this State of at least one year next preceding the date of this petition.

Tenth. I have not heretofore made petition for citizenship to any court. (Strike out inapplicable clauses.) Petition ____ and ____, on the ____ day of ____, ____ (Name of Court) ____ (Give Docket No.) ____ (Disposition of petition.)

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Department of Labor, together with my affidavit and the affidavits of the two witnesses thereto, required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

DOUGLAS CLYDE MACINTOSH

Eighth. I am able to speak the English language.

Ninth. I have resided continuously in the United States of America for the term of five years at least immediately preceding the date of this petition, to wit, since the 18th day of November, anno Domini 1916, and in the State of Connecticut continuously next preceding the date of this petition, since the 18th day of November, anno Domini 1916, being a residence within this State of at least one year next preceding the date of this petition.

Tenth. I have not heretofore made petition for citizenship to any court. [illegible] showing of record that on the ___ day of ___, Anno Domini ___ the said applicant [illegible]

[illegible]

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Department of Labor, together with my affidavit and the affidavits of the two verifying witnesses thereto, required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

DOUGLAS CLYDE MACINTOSH
(Complete and true signature of petitioner.)

Declaration of Intention No. 18712 and Certificate of Arrival from Department of Labor filed this 18th day of March, 19 29

Note to Clerk or Court.—If petitioner arrived in the United States on or between June 29, 1906, strike out the words reading "and Certificate of Arrival from Department of Labor."

AFFIDAVITS OF PETITIONER AND WITNESSES

District of Connecticut
New Haven } ss:

The aforesaid petitioner being duly sworn, deposes and says that he is the petitioner in the above-entitled proceedings; that he has read the foregoing petition and knows the contents thereof; that the said petition is signed with his full, true name; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

DOUGLAS CLYDE MACINTOSH
(Complete and true signature of petitioner.)

John C. Archer, occupation Superintendent of Buildings, residing at New Haven, Conn.
and George H. Pierson, occupation Professor, residing at New Haven, Conn.
each being severally, duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known Douglas Clyde Macintosh, the petitioner above mentioned, to have resided in the United States continuously immediately preceding the date of filing his petition, since the 1st day of December, anno Domini 1916, and in the State in which the above-entitled petition is made continuously since the 1st day of December, anno Domini 1916; and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and that the petitioner is in every way qualified, in his opinion, to be admitted a citizen of the United States.

So

J. C. Archer
(Signature of witness.)

G. H. Pierson
(Signature of witness.)

Subscribed and sworn to before me by the above-named petitioner and witnesses in the office of the Clerk of said Court this 18th day of March, anno Domini 19 29 [SEAL]

C. R. PICKETT, Clerk.
By D. GOLDBERG, Deputy Clerk.

[print]
32870—21. (Face p. T). No. 1

IN THE MATTER OF THE PETITION OF

DOUGLAS CLYDE MACINTOSH

TO BE ADMITTED A CITIZEN OF THE UNITED STATES OF AMERICA.

Filed March 18, 1929

OATH OF ALLEGIANCE

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to George V, by the Grace of God, of G. B, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India. of whom I have heretofore been a subject; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same.

DOUGLAS CLYDE MACINTOSH

Subscribed and sworn to before me, in open Court, this _____ day of _____, A. D. 19____

_____, Clerk.

NOTE—In renouncing all title of nobility, add the following to the oath of allegiance before it is complete: "I further renounce the title of (give title), an order of nobility, which I have heretofore held."

ORDER OF COURT ADMITTING PETITIONER

Upon consideration of the petition of _____, and affidavits in support thereof, and further testimony taken in open Court, it is ordered that the said petitioner, who has taken the oath required by law, be, and hereby is, admitted to become a citizen of the United States of America, this _____ day of _____, A. D. 19____

It is further ordered, upon consideration of the petition of the said _____ that his name be, and hereby is, changed to _____, under authority of the provisions of section 6 of the act approved June 29, 1906 (34 Stat. L., pt. 1, p. 596), as amended by the act approved March 4, 1913, entitled "An act to create a Department of Labor."

By the Court:

_____, Judge.

ORDER OF COURT DENYING PETITION

Upon consideration of the petition of DOUGLAS CLYDE MACINTOSH and the motion of the examiner for the United States in open Court this 24th day of June, 1929, it appearing that petitioner refused to take unqualified oath.

THE SAID PETITION IS HEREBY DENIED.

ORDER OF COURT ADMITTING PETITIONER

Upon consideration of the petition of _____, *and affidavits in support thereof, and further testimony taken in open Court, it is ordered that the said petitioner, who has taken the oath required by law, be, and hereby is, admitted to become a citizen of the United States of America, this* _____ *day of* _____, *A. D. 19*____.

It is further ordered, upon consideration of the petition of the said _____, *that his name be, and hereby is, changed to* _____, *under authority of the provisions of section 6 of the act approved June 29, 1906 (34 Stat. L., pt. 1, p. 596), as amended by the act approved March 4, 1913, entitled "An act to create a Department of Labor."*

By the Court:

_____, *Judge.*

ORDER OF COURT DENYING PETITION

Upon consideration of the petition of DOUGLAS CLYDE MACINTOSH *and the motion of* the examiner

for the United States in open Court this 26th *day of* June, *19*29, *it appearing that* petitioner refused to take unqualified oath.

THE SAID PETITION IS HEREBY DENIED.

DENIED, *Judge.*

MEMORANDUM OF CONTINUANCES

AFFIDAVITS OF PETITIONER AND WITNESSES — REASONS FOR CONTINUANCE

Continued from _____, *19*____ _____

to _____, *19*____ _____

Continued from _____, *19*____ _____

to _____, *19*____ _____

NAMES OF SUBSTITUTED WITNESSES

Geo. A. Baitsell, *occupation* Professor, *residing at* New Haven, Conn.

_____, *occupation* _____, *residing at* _____

Certificate of Naturalization, No. _____, *issued on the* _____ *day of* _____, *A. D. 19*____.

[ADDRESS OF PETITIONER KEPT CONFIDENTIAL AND CHANGES OCCURRING AFTER FILING AND BEFORE NATURALIZATION]

22870—21. (Face p. 7). No. 2

Form 2213

Petition No. _____

(To be pasted on the back of the petition before the oath of each attesting witness. See Rule 28, Naturalization Regulations, 1913)

AFFIDAVIT OF WITNESSES

_____ District Court of United States,

In the matter of the petition of Douglas Clyde Macintosh to be admitted a citizen of the United States of America.

District of Connecticut
New Haven
} ss.

George Dahl, a witness produced Professor, residing at New Haven, Ct.

and _____, a witness produced _____, residing at _____

each being separately, duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known Douglas Clyde Macintosh, the petitioner above mentioned, to have resided in the United States continuously immediately preceding the date of filing his petition, since the 12th day of November, anno Domini 1916, and to this said to which the above entitled petition is made continuously since the 12th day of November, anno Domini 1916, and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and that the petitioner is in every way qualified, in his opinion, to be admitted a citizen of the United States.

George Dahl
(Subscribing witness)

_____
(Subscribing witness)

Subscribed and sworn to before me by the above-named witnesses in the office of the said of said court this 19th day of June, anno Domini 29.

[SEAL.]

C. B. Pickett, Clerk.

By H. M. Tyler, Deputy Clerk.

THE UNITED STATES VS. DOUGLAS CLYDE MACINTOSH

11 In United States District Court, District of Connecticut

Memorandum re questions 19, 20, and 22

NEW HAVEN, CONN., *June 10, 1929.*

Memorandum submitted to the judge of the United States District Court at New Haven, Conn.

I wish to make clear the interpretations which I must put upon questions 19, 20, and 22 in the preliminary form for petition for naturalization if I am to be able to answer these questions in the affirmative.

19. I believe in the general form of the Government of the United States, but I do not regard it as in all respects ideal. I am inclined to think that an adaptation of what is known in municipal government as the "city-manager plan" might be better than the present system.

20 and 22. I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support "my country, right or wrong" in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not "take up arms in defence of this country," however "necessary" the war may seem to be to the
12 Government of the day. It is only in a sense consistent with these statements that I am willing to promise to "support and defend" the Government of the United States "against all enemies foreign and domestic." But, just because I am not certain that the language of questions 20 and 22 will bear the construction I should have to put upon it in order to be able to answer them in the affirmative, I have to say that I do not know that I can say "Yes" in answer to these two questions.

Respectfully submitted.

DOUGLAS CLYDE MACINTOSH.

In United States District Court

Memorandum entitled "War Record"

WAR RECORD OF D. C. MACINTOSH

1. In September, 1914, he wrote the Canadian Minister of Militia, saying that he would not give up his Canadian citizenship before the end of the war, and intimating that his services would be given whenever called for.

2. In June, 1916, on the basis of letters from Dean Brown and ex-President Taft to the Canadian Minister of Militia, he was appointed chaplain in the Canadian Army, and served with that army in England and France until November of that year. He was

13 with the Second Canadian Division near Vimy Ridge and with the Fourth Canadian Division during a part of the battle of the Somme. In September he had cabled asking for an extension of leave from Yale University that he might continue his service with the army in France for at least another year, but the permission asked was not granted.

3. In 1917 he applied for reappointment as chaplain but was informed that the practice of appointing chaplains for a definite period of service had been discontinued.

4. In May, 1918, he joined the American Y. M. C. A. for service with the Army and was in the war work of the Y. M. C. A. until after the amistice went into effect. At the end of the war and for some time before that time he was in charge of the Y. M. C. A. hut at the front in the St. Mihiel region.

In United States District Court

Excerpt from Who's Who in America

[Who's Who in America, 1926–1927]

MACINTOSH, DOUGLAS CLYDE, prof. theology; b. Breadalbane, Ont., Can., Feb. 18, 1877; s. Peter and Elizabeth Charlotte (Everett) M.; McMaster U., Toronto, 1903; Ph. D., U. of Chicago, 1909; m. Emily Powell, of Marion, Ind., Feb. 13, 1921 (died Nov. 2, 1922); m. 2nd, Hope Griswood Conklin, of Cambridge, Mass., July 1, 1925.
14 Instr. philosphy, McMaster U., Toronto, 1903–04; ordained Bapt. ministry, 1907; prof. Bibl. and systematic theology, Brandon (Manitoba) Coll., 1907–09; prof. systematic theology, 1909–16, Dwight; prof. theology since 1916, Yale U. Chmn. dept. of religion, Yale Grad. Sch. Chaplain, rank of capt., Can. E. F., in Eng. and France, 1916; Y. M. C. A. sec. with A. E. F., in France, 1918. Mem. Am. Philos. Assn., Am. Theol. Soc. Club: Graduate. Author: The Reaction Against Mataphysics in Theology, 1911; The Problem of Knowledge, 1915; God in a World at War, 1918; Theology as an Empirical Science, 1919. Editor of G. B. Foster's Christianity in Its Modern Expression, 1921; The Reasonableness of Christianity, 1925. Home: 25 Woodlawn St., New Haven, Conn.

In United States District Court

Statement of facts and order approving same

Since no stenographic record of the proceedings before the naturalization examiner or the court was made, a statement of the facts which were substantially presented to the court in connection with this petition has been prepared, as follows:

In the fall of 1904 the applicant entered the United States to become a graduate student at the University of Chicago. In 1907 the applicant was ordained as a Baptist minister. In the same year

he returned to Canada, where he was engaged in teaching for two years. In 1909 he returned to the United States to fill a teaching position in Yale University. Within the first year of his residence in New Haven the applicant made a formal declaration of his intention of becoming a citizen of the United States. It was necessary to wait for five years before taking out final naturalization papers, and shortly before the five-year period was up Great Britain and the Dominion of Canada had become involved in the war with Germany. Believing that he ought not to give up his British allegiance while his country was at war, the applicant wrote to the Canadian Minister of Militia, in September, 1914, stating that he would not give up his Canadian citizenship before the end of the war, and giving his New Haven address in order that his services might be called for when needed. No call for his services having come, in the spring of 1916 he wrote to Ottawa, applying for an appointment as chaplain in the Canadian Army for overseas service, and offering his services without remuneration. Early in June, 1916, the applicant received his appointment as chaplain and proceeded to England, where he served in the First Canadian Command depot, and afterwards to France, where he saw service at the front in the neighborhood of Vimy and in the battle of the Somme.

In the early fall of 1916 the applicant cabled to his dean requesting leave of absence from the university so that he might continue his services as chaplain in the army. This request was not granted, and he returned to America in November, 1916. In the spring of 1917 he applied for reappointment as chaplain, but was informed that the practice of making temporary appointments had been discontinued. During this year the applicant made about forty public addresses in support of the cause of the western Allies. In the spring of 1918 he joined the American Y. M. C. A. for overseas service, and in May proceeded to France, where he was engaged in war service at several points, his final service being in charge of a "Y" hut at the front in the St. Mihiel region, where he remained until after the armistice went into effect.

By the time the war was over the applicant's "first papers," declaring his intention of becoming a citizen of the United States, had become null and void, by reason of the lapse of more than seven years since they had been taken out. In February, 1919, he took out his "first papers" a second time, and was now required to wait for two years before being allowed to take out his final papers. However, there was a delay in obtaining these final papers because of the difficulty of verifying the entrance of the applicant into the country. Later it became necessary to cancel his first papers in order to secure a British passport for a longer period than three months in view of a contemplated trip to the Orient, it being impossible to become an American citizen in time to secure an American passport for this trip. For the purposes of this petition the

applicant decided to give, as the date of his legal entry into the United States, November, 1916, this being the date of his return from overseas service in the Canadian Army. This was done
17 in the hope that the Immigration Bureau might have a record of this entry and thus be able to verify the fact that he had come into the country.

At the hearing the preliminary form for petition for naturalization signed by the petitioner was exhibited to him. In this preliminary form he had answered in reply to question 22, which reads "If necessary, are you willing to take up arms in defense of this country?" "Yes; but I should want to be free to judge as to the necessity." There was also exhibited to the petitioner a statement entitled Memorandum Submitted to the Judge of the United States District Court at New Haven, which had been prepared and presented by the petitioner at the preliminary hearing before the naturalization examiner on June 10, 1929. Both of these documents are part of the record for appeal. In answer to questions 19, 20, and 22 of the preliminary form for petition for naturalization, which read—

"19. Do you fully believe in the form of government of the United States?

"20. Have you read the following oath of allegiance: 'I hereby declare on oath that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to , to whom I have heretofore been a subject; that I will defend the Constitution and laws of the United States of America against all enemies, foreign or domestic;
18 and that I will bear true faith and allegiance to the same'—are you willing to take this oath in becoming a citizen?

"22. If necessary, are you willing to take up arms in defense of this country?"

the petitioner stated in the memorandum:

"I wish to make clear the interpretations which I must put upon questions 19, 20, and 22 in the preliminary form for petition for naturalization if I am to be able to answer these questions in the affirmative.

"19. I believe in the general form of Government of the United States, but I do not regard it as in all respects ideal. I am inclined to think that an adaptation of what is known in municipal government as the "city-manager plan" might be better than the present system.

"20 and 22. I am willing to do what I judge to be in the best interests of my country, but only insofar as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support "my country, right or wrong," in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not 'take up arms in defense of this country,' however 'necessary' the war may seem to be to the Government of the day.

19 "It is only in a sense consistent with these statements that I am willing to promise to 'support and defend' the Government of the United States against all enemies, foreign and domestic.' But, just because I am not certain that the language of questions 20 and 22 will bear the construction I should have to put upon it in order to be able to answer them in the affirmative, I have to say that I do not know that I can say 'Yes' in answer to these two questions."

In regard to this memorandum the petitioner at the hearing before the court testified that the statements contained in said memorandum as to the interpretation he wished to place on questions 19, 20, and 22 in the preliminary form for petition for naturalization expressed the views he held upon these matters, but he further explained that he was not inclined to emphasize the latter part of his statement in connection with question 19, and that he believed that any changes he might think desirable in the form of government should be made only by legal and constitutional means. He further declared that he was not a pacifist, and that if allowed to interpret the oath of allegiance for himself—and he added that no one could be expected to take it without interpreting it—he would interpret it as not inconsistent with his position and would take this oath. He stated that he would answer question 22 in the affirmative only on the understanding that he would have to believe that the war was morally justified before he would take up arms in it or give it his moral support.

20 In answer to a question the applicant replied that, in his opinion, his first allegiance was to the will of God, defined as what was morally right and for the ultimate well-being of humanity, and that after that he would put allegiance to one's country as coming before all merely individual and private interest. He stated further that he was ready to give to the United States, in return for citizenship, all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God. The applicant explained that if he were to be a citizen of the United States he would recognize special duties and obligations by virtue of that citizenship over and above his general duty to humanity as such. The applicant believed that the international outlook he advocated would not mean the doing away of nationalism. The applicant believed that only by being a patriotic citizen of his own country would he be in a position to work most effectively for human well-being in general, just as he believed that, all other things being equal, it would not be by overlooking special duties to his own family and to other local groups that he could best promote the well-being of the community.

He added that even if his country were to engage in what he had to regard as an unjustified war he would still regard himself as

under moral obligation not to do anything that would injure his country, but rather to try to act for the true well-being of his
21 country, though not against the true well-being of mankind in general.

It would be difficult to state in detail before the event just what this would involve, but while the applicant did not anticipate engaging in any propaganda against the prosecution of a war which the Government had already declared and which it considered to be justified, he preferred not to make any absolute promise at the time of the hearing because of his ignorance of all the circumstances which might affect his judgment in reference to such a war. In any case he did not question that the Government, under certain conditions, could regulate and restrain the conduct of the individual citizen even to the extent of imprisonment. The applicant recognized the principle of the submission of the individual citizen to the opinion of the majority in a democratic country, but he did not believe in having his own moral problems solved for him by the majority. The applicant testified that the position taken was the only one he could have taken consistently with his moral principles and with what he understood to be the moral principles of Christianity.

When asked by the judge if he did not think it would be disastrous to the cause of good government if citizens generally should make their willingness to bear arms dependent upon their individual views with respect to the justice of the causes and reasons underlying the declaration of war, the applicant replied that he did not
22 think so, but believe, on the contrary, that it would be a very good thing if all citizens were to put allegiance to the will of God and the welfare of humanity first, and next to that their allegiance to their country and its Government. If they did so, they would not violate the Constitution and laws of the country for selfish private purposes, such as the satisfying of their appetites or of their desire for gain. Moreover, with regard to going to war, he thought no government of a democratic country should want to go to war without the moral support of at least a majority of its thoughtful and conscientious citizens. The applicant also stated that a citizen should have the right to be informed of the reasons for the declaration of any war. In short, while he recognized the right of the Government to restrain the freedom of the individual for the good of the social whole, he was convinced, on the other hand, that the individual citizen should have the right respectfully to withhold from the Government his military services (involving, as they probably would, the taking of human life), when his best moral judgment would compel him to do so. The applicant was willing to support his country even to the extent of bearing arms, if asked to do so by the Government, in any war which he could regard as morally justified.

While devoted to the cause of peace, the applicant stated that he was not a pacifist in the ordinary sense of that term, because

it did not seem to him that Christian principles required absolute pacifism on the part of all. What Christianity or any truly ethical system required was acceptance of the ideal of the highest
23 well-being of all persons, and intelligent and persistent devotion to the realization of that end. The applicant declared that he believed that there was a rightful place for the use of force by the Army and Navy in the exercise of police functions in national or international relations and that there were circumstances under which such force could also be justifiably used, for instance, to repel invasion, or even to defend a weaker nation. Since it would be neither wise nor right for the Nation to adopt absolute and unconditional pacifism, the applicant did not believe any moral necessity rested upon him to adopt an unconditionally pacifist position.

Inasmuch as another war would probably be so much more disastrous than the last so as to threaten the survival of civilization itself, and inasmuch as it was obviously the duty of every one to do everything he could to prevent such a catastrophe, the applicant believed it would be positively immoral to give a blanket promise beforehand to support any and every future war in which one's country might engage, when in the nature of the case it could not be known so far ahead of the time that all such wars would be morally justified.

The applicant also stated that he believed his position would help make for the peace of the world.

The petitioner offered at the hearing before the court a typewritten document entitled War Record of D. C. Macintosh and an excerpt from the publication Who's Who in America relating to himself, both of which are part of the record on appeal.

24 This statement of the facts presented to the United States District Court is hereby agreed to by counsel for the petitioner and by the assistant United States attorney at Hartford, Connecticut.

CHARLES E. CLARK,
Attorney for Petitioner-Appellant.
GEORGE H. COHEN,
Assistant United States Attorney
at Hartford, Connecticut.

This agreed statement of facts is hereby approved.

WARREN B. BURROWS,
Judge of the United States District Court,
District of Connecticut.

In United States District Court

Recommendation of examiner and order thereon

Form 2352

U. S. Department of Labor

Naturalization Service

Dated JUNE 24, 1929. List No. ____

NATURALIZATION PETITIONS RECOMMENDED TO BE DENIED

To the Honorable the District Court of the United States for the District of Connecticut, Sitting at New Haven:

The undersigned, duly designated under the act of June 8, 1926 (Public No. 358, 69th Cong.), to conduct preliminary hearings upon petitions for naturalization to the above-named court and to make findings and recommendations thereon, has personally examined under oath at a preliminary hearing each of the following: One (1) petitioner for naturalization and their required witnesses; has found, for the reasons stated below, that such petition should not be granted, and therefore recommends that each such petition be denied.

No.	Petn. No.	Name of petitioner	Reason for denial
1	9886	Douglas Clyde Macintosh	Attachment to the principles of the Constitution not shown.

Respectfully submitted.
Date, June 24, 1929.

JOHN F. DAVIS,
(Signature of designated examiner or officer)

UNITED STATES OF AMERICA,
District of Connecticut,
Sitting at New Haven Division, ss:

Upon consideration of the petitions for naturalization listed above, and the findings and recommendations thereon of a duly designated examiner or officer of the Bureau of Naturalization (or Naturalization Service), at a final hearing in open court this 24th day of June, A. D. 1929, it is hereby ordered that each of the said petitions be, and hereby is, denied.

By the court:

WARREN B. BURROWS, *Judge.*

In United States District Court

In the matter of the petition for citizenship of DOUGLAS CLYDE MACINTOSH

Final decree

January 8, 1930

This petition, together with the recommendation of John F. Davis that it be denied, came on to be heard at New Haven, Connecticut, on the 24th day of June, 1929.

27 And now, upon consideration of the petition of Douglas Clyde Macintosh, affidavits in support thereof, the findings and recommendations of John F. Davis, duly designated examiner of the Bureau of Naturalization, and the testimony of the petitioner and his witnesses in open court on said 24th day of June, 1929, it appearing that the said petitioner, considering his allegiance to be first to the will of God, would not promise in advance to bear arms in defense of the United States under all circumstances but only if he believed the war to be morally justified, it is

Decreed that the petitioner is not attached to the principles of the Constitution of the United States and further decreed that said petition for citizenship is denied.

WARREN B. BURROWS,
United States District Judge.

NEW HAVEN, CONN., *January 8th, 1930.*
Enter.

28 In United States District Court

[Title omitted.]

Petition for appeal

Filed Mar. 6, 1930

Now comes the petitioner, Douglas Clyde Macintosh, by his attorney, considering himself aggrieved by the decree of this court, dated the 8th day of January, 1930, and entered and filed in the office of the clerk of this court on the 8th day of January, 1930, in the above-entitled cause, and does hereby appeal from such decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and said petitioner prays that the appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said decree was made and of an agreed statement of facts prepared in accordance with Equity Rule No. 77, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, under the rules of such court in such cases made and provided.

29 And your petitioner further prays that the proper order relating to the required security to be required of him be made.

Dated, New Haven, March 6th, 1930.

CHARLES E. CLARK,
Attorney for Petitioner-Appellant.

Office & post-office address, Yale Law School, New Haven, Connecticut.

In United States District Court

Order allowing appeal

Appeal allowed upon giving bond, as required by law, for the sum of $250.

WARREN B. BURROWS,
United States District Judge.

30 In United States District Court

[Title omitted.]

Assignment of errors

Filed Mar. 6, 1930

And now, on the 6th day of March, A. D. 1930, comes the petitioner, Douglas Clyde Macintosh, by his attorney, and says that the decree of the United States District Court at New Haven, Connecticut, entered in connection with the above-entitled cause on the 8th day of January, 1930, denying citizenship to the petitioner, is erroneous and unjust to the petitioner.

1. Because the court erred in holding that the statement of the petitioner that his allegiance was, first, to the will of God and, secondly, to his own country, proved that the petitioner was not attached to the principles of the Constitution of the United States.

2. Because the court erred in holding that the unwillingness of the petitioner to promise in advance to bear arms in defense of the United States under all circumstances, but only if he believed
31 the war to be morally justified, proved that the petitioner was not attached to the principles of the Constitution of the United States.

3. Because the court erred in holding that the answer of the petitioner to question 22 of the preliminary form of petition for naturalization in the words, "Yes; but I should want to be free to judge as to the necessity," proved that the petitioner was not attached to the principles of the Constitution of the United States.

4. Because the court erred in holding that the explanation of the petitioner of his answer to question 22 of the preliminary form of petition for naturalization, submitted to the court on June 10, 1929, proved that he was not attached to the principles of the Constitution of the United States.

5. Because the court erred in denying the petition of said petitioner on the written statements submitted and the oral answers given by the petitioner before the court, which have been made part of the agreed statement of facts filed herein.

Wherefore the petitioner prays that the said decree be reversed.

Dated, New Haven, March 6, 1930.

CHARLES E. CLARK,
Attorney for Petitioner-Appellant.

Office & post-office address, Yale Law School, New Haven, Connecticut.

32–33 [Citation in usual form showing service on George H. Cohen omitted in printing.]

34 In United States Circuit Court of Appeals

[Title omitted.]

Stipulation omitting bond from record

It is hereby stipulated and agreed that the bond on appeal should not be printed as part of the transcript of record.

Dated, March 26, 1930.

CHARLES E. CLARK,
Attorney for Petitioner-Appellant.
GEORGE H. COHEN,
Assistant United States Attorney.
Hartford, Connecticut.

35 In United States District Court

[Title omitted.]

Stipulation as to contents of record

It is hereby stipulated and agreed, by and between the parties hereto through their respective attorneys, that the transcript of record on appeal in the above-entitled petition shall include the following:

1. Declaration of intention of petitioner, dated February 18, 1925.
2. Preliminary form for petition for naturalization of petitioner, dated July 7, 1927.
3. Certificate of arrival issued by the Bureau of Naturalization of the United States Department of Labor, dated October 1, 1927.
4. Petition for naturalization of petitioner, dated March 18, 1929.
5. Affidavit of petitioner, dated March 18, 1929.

36 6. Affidavits of witnesses John C. Archer and George H. Pierson, dated March 18, 1929.

7. Affidavit of witness George Dahl, dated June 10, 1929.
8. Memorandum by the petitioner submitted to judge of the United States District Court, District of Connecticut, dated June 10, 1929.

9. Memorandum entitled War Record of D. C. Macintosh submitted to the judge of the United States District Court, District of Connecticut, at the hearing on June 24, 1929.

10. Excerpt from Who's Who in America, 1926-27, relating to the petitioner, submitted to the judge of the United States District Court, District of Connecticut, at the hearing on June 24, 1929.

11. Statement of facts which were presented to the United States District Court, District of Connecticut, at the hearing before said court on June 24, 1929, agreed to by the United States attorney at Hartford, Connecticut, and by counsel for petitioner and approved by the judge of said court.

12. Recommendation of John F. Davis, examiner of the Bureau of Naturalization, for the denial of the petition for naturalization and the order of the judge of the United States District Court, District of Connecticut, denying such petition, both dated June 24, 1929.

37 13. Final decree of the judge of the United States District Court, District of Connecticut, denying the petition for citizenship, dated January 8, 1930.

14. Petition for appeal and order of allowance of the appeal, dated and filed March 6, 1930.

15. Bond on appeal.

16. Assignment of errors, dated and filed March 6, 1930.

17. Citation addressed to United States attorney at Hartford, Connecticut, dated March 7, 1930, and acknowledgment of service thereof, dated March 8, 1930.

Dated, March 26, 1930.

CHARLES E. CLARK,
Attorney for Petitioner-Appellant.
GEORGE H. COHEN,
Assistant United States Attorney,
Hartford, Connecticut.

38 In United States District Court

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, April , 1930.

CHARLES E. CLARK,
Attorney for Petitioner-Appellant.
GEORGE H. COHEN,
Assistant United States Attorney,
Hartford, Connecticut.

[Clerk's certificate to foregoing transcript omitted in printing.]

40 In United States Circuit Court of Appeals for the Second Circuit

DOUGLAS CLYDE MACINTOSH, PETITIONER-APPELLANT

AGAINST

UNITED STATES, RESPONDENT-APPELLEE

Before MANTON, L. HAND, and SWAN, Circuit Judges

Appeal from the District Court for the District of Connecticut. The petitioner applied for admission to citizenship of the United States. An order was entered denying his admission; petitioner appeals. Reversed.

Davis, Polk, Wardwell, Gardiner & Reed, Esqs., attorneys for appellant; John W. Davis, Esq.; Charles E. Clark, Esq., Allen Wardwell, Esq., of counsel.

John Buckley, Esq., United States attorney; George H. Cohen, Esq., asst. U. S. attorney.

Opinion

MANTON, Circuit Judge:

The appellant was born in Canada, entered the United States in 1904, and was ordained a Baptist minister in 1907 after studying in this country. He went to Canada for two years and in 1909, returned to the United States, and became a professor at Yale University, where he is still teaching.

41 After filing a declaration of his intention to become a citizen on February 18, 1925, he filed with the District Court a petition for naturalization, accompanied by the proper certificate and affidavits of witnesses. June 10, 1929, he was given a preliminary hearing before a naturalization examiner, at which time he submitted a memorandum explaining at length answers to questions which appeared in the preliminary form for the petition for naturalization. Question 22 was, "If necessary, are you willing to take up arms in defense of this country?" to which he answered, "Yes; but I should want to be free to judge as to the necessity." In his memorandum the petitioner referred to questions 19, 20, and 22 and said:

"19. I believe in the general form of the government of the United States, but I do not regard it as in all respects ideal. I am inclined to think that an adaptation of what is known in municipal government as the 'city manager plan' might be better than the present system.

"20 and 22. I am willing to do what I judge to be in the best interests of my country, but only insofar as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support 'my country, right or wrong' in any dispute which may arise, and I am not willing to promise

beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not 'take up arms in defense of this country,' however 'necessary' the war may
42 seem to be to the Government of the day.

"It is only in a sense consistent with these statements that I am willing to promise to 'support and defend' the Government of the United States 'against all enemies, foreign and domestic.' But, just because I am not certain that the language of questions 20 and 22 will bear the construction I should have to put upon it in order to be able to answer them in the affirmative, I have to say that I do not know that I can say 'Yes' in answer to these two questions."

On June 24, 1929, he submitted, in addition to this memorandum, a memorandum of his war record during the World War and an excerpt from Who's Who in America. The war record showed service in the Canadian Army as a chaplain over seas in the neighborhood of Vimy Ridge and in the battle of the Somme. He returned to America in 1916 and made addresses supporting the allies, joined the Y. M. C. A., and again went to France in 1918 and took charge of a Y. M. C. A. hut at the front in the St. Mihiel region until the armistice.

The statement of facts is stipulated. It appears that the appellant stated that he was ready to give to the United States, in return for citizenship, all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God. And the applicant explained that if he were to be a citizen of the United States he would recognize special duties as obligations by virtue of that citizenship over and above his general duty to humanity as
43 such. The appellant declared that he believed that there was a rightful place for the use of force by the Army and Navy in the exercise of police functions in national or international relations and that there were circumstances under which such force could also be justifiably used, for instance, to repel invasion, or even to defend a weaker nation. And he stated that since it would be neither wise nor right for the Nation to adopt absolute and unconditional pacifism, the applicant did not believe any moral necessity rested upon him to adopt an unconditionally pacifist position. It was further stipulated that the applicant believed it would be positively immoral to give a blanket promise beforehand to support any and every future war in which one's country might engage, when in the nature of the case it could not be known so far ahead of the time that all such wars would be morally justified. The applicant also stated that he believed his position would help make for the peace of the world. The court denied his application for citizenship, reciting in the decree that the petitioner is not attached to the principles of the Constitution of the United States.

The naturalization act of June 29, 1906, requires the applicant for citizenship, before admission, to declare under oath that he will

support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same. (U. S. Code, title 8, § 381.) And § 382 provides that before admission it shall be made to appear to the satisfaction of the court that during his five years' residence, preceding the application, the applicant has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. Question 22, which defendant answered in the qualified way referred to, was considered by the Supreme Court in United States vs. Schwimmer (279 U. S. 644), and the court there, in denying the applicant's admission to citizenship, stated that it is the duty of citizens, by force of arms, to defend our Government against all enemies whenever necessity arises, and this was a fundamental principle of the Constitution. The court said:

"Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the 'good order and happiness' of the United States can not long endure. * * *" (at p. 650).

And again:

"A pacifist in the general sense of the word is one who seeks to maintain peace and to abolish war. Such purposes are in harmony with the Constitution and policy of our Government. But the word is also used and understood to mean one who refuses or is unwilling for any purpose to bear arms because of conscientious considerations and who is disposed to encourage others in such refusal. And one who is without any sense of nationalism is not well bound or held by the ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and devotion to the principles of our Constitution that is required of aliens seeking naturalization. * * *" (p. 652).

The refusal to perform military service on account of religious scruples has not been regarded as inconsistent with the duties and obligations of citizenship. But the examiner did not exceed his powers in probing into the opinions and beliefs of the appellant. The naturalization law of 1906 (U. S. Code, title 8, §§ 381–2) requires that the beliefs of an applicant in respect to his opposition to organized government should be investigated, and it is only when it appears to the satisfaction of the court that the applicant has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, that he will be admitted. And he must support and defend the Constitution and laws of the

United States against all enemies, foreign and domestic, bearing true faith and allegiance to the same. An inquiry as to whether he will willingly bear arms is a proper inquiry to ascertain where the applicant stands in the test thus laid down by the naturalization law, but it does not follow because the applicant did not answer question No. 22 categorically, but qualified his answer by the statements referred to, that he has not complied with the requirements of the naturalization law entitling him to admission. Question 22 is merely informative and necessarily directed to determine whether the applicant is attached to the principles of the Constitution
46 and laws of the United States. It will, of course, be recognized as a duty of the citizen to bear arms in defense of his country, but there is also the well-recognized qualification that a person does not lack nationalism or affection for his government if, by reason of a conscientious religious scruple, he requests being excused from bearing arms.

The historical evidence of the recognition of the right of a citizen to be excused from military service based on conscientious religious scruples is found in the provisions of some of the State statutes[1] and constitutions, as well as various acts of Congress.[2]

47 Nor is there any fixed principle of the Constitution of this country requiring a citizen with conscientious or religious scruples against bearing arms, to nevertheless bear arms in time of war. Congress has recognized that persons having conscientious scruples against bearing arms shall be exempt. (Annals of Congress, 13th Congress, 3rd session, vol. 3, pp. 774–5.) The act of 1903 (Laws of 1903, ch. 196, sec. 2; 32 Stat. 775) states that no person whose religious convictions are against war or participation therein shall be compelled to serve in the militia or other armed force. The act of June 2, 1916 (Laws of 1916, ch. 134, sec. 58, 59; 39 Stat. 197), providing that the militia shall consist of able-bodied citizens between the ages of 18 and 45, reads that "all persons who because of religious belief shall claim exemption from military service * * * shall be exempted from militia service in a combatant capacity." The selective draft act of May 18, 1917 (Laws of 1917, ch. 15, sec. 4; 40 Stat. 78), provides that a person whose religious convictions are

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[1] Georgia: Act Aug. 5, 1782, Colonial Records, ed. Candler, v. 19, pt. 2, p. 155. Maryland: Laws, March, 1778, c. 5, secs. 6 and 15; act Oct. 1780, c. 33, § 2; act Oct. 1780, c. 48, §§ 6, 19; act May, 1781, c. 15, § 7; act Nov. 1781, c. 23, §§ 14–16. Massachusetts: Resolve June 16, 1781, c. 36; Laws and Resolves, 1780–1781, p. 621. New Hampshire: Act January 18, 1777, c. 5, Metcalf's ed., vol. 4, Laws, p. 77; act of June 26, 1779, c. 19, Laws, supra, p. 219; act of June 16, 1780, c. 3, Laws, supra, p. 293; act June 27, 1780, c. 12, Laws, supra, 304. North Carolina: Laws, November, 1777, c. 19, State Records, vol. 23, p. 128. Laws of April, 1778, 1st sess., c. 1, State Records, vol. 24, p. 154. Laws of November, 1779, c. 1, State Records, vol. 24, p. 262. Laws, 1781, c. 1, State Records, vol. 24, p. 362, c. 10, State Records, vol. 24, p. 404. South Carolina: 1778, v. 4, St. L., p. 410, No. 1075, amended by act of October 9, 1778, No. 1103, 4 Stat. 453. Virginia: Act May, 1777, c. 2, 9 Hen. 276–277; act October, 1777, c. 1, 9 Hen. 339–341; act October, 1778, c. 45, 9 Hen. 588; act May, 1779, c. 19, 10 Hen. 82; act October, 1779, c. 50, 10 Hen. 214; act May, 1780, c. 12, 10 Hen. 250; act October, 1780, c. 8, 10 Hen. 336, 338; act May, 1782, c. 2, 11 Hen. 14.

[2] Constitution of Alabama, 1819; Arkansas, 1868; Colorado, 1876; Florida, 1868; Idaho, 1889; Illinois, 1818, 1870; Indiana, 1816; Iowa, 1846 and 1857; Kansas, 1855, 1857; Kentucky, 1792, 1799; Louisiana, 1879, 1898; Maine, 1819; Maryland, 1864; Michigan, 1850; Mississippi, 1817; Missouri, 1820, 1865, 1875; New Hampshire, 1792; New York, 1821, 1846, 1894; North Carolina, 1868, 1876; Pennsylvania, 1790, 1838, 1873; South Carolina, 1895; Vermont, 1793.

against war or participation therein shall not be required or compelled to serve in any of the forces but will be subject to render services of a noncombatant nature. This Federal legislation is indicative of the actual operation of the principles of the Constitution, that a person with conscientious or religious scruples need not bear arms, although, as a member of society, he may be obliged to render services of a noncombatant nature. The general policy always has been to avoid with care any compulsion which infringes on the religious scruples of anyone. "Even in the important matter
48 of bearing arms for the public defense those who can not in conscience take part are excused, and their proportion of this great and sometimes imperative burden is borne by the rest of the community." (Cooley, Constitutional Limitations, 8th ed., vol. 2, p. 983-4.)

A citizen sharing views which amount to conscientious or religious scruples against bearing arms in what he regards as an unjustified war is akin to one having conscientious scruples against all wars. There is a distinction between a morally justified and an unjustified war, as recognized in international law. (Vattel, Law of Nations, Book III, ch. 3, secs. 24, 29, 33, 34, 39; Hall, International Law, 8th ed., ch. 3, sec. 16; Wheaton, International Law, 6th ed., vol. 2, p. 630; Oppenheim, International Law, 4th ed., vol. 2, sec. 63, p. 130.) Such recognition was given in the recent Kellogg pact. It strongly lies in the desire to maintain peace and abolish war. Story in his work on the Constitution (Vol. II, sec. 1876), says: "The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God and can not be encroached upon by human authority without a criminal disobedience of the precepts of natural as well as revealed religion." The rights of conscience are unalienable, which the citizen need not surrender and which the Government or society can not take away.

"'Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience and reason'; and it is also his 'natural and unalienable right' not to be 'hurt, molested, or restrained in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments, or persuasion,' provided he does not disturb others." (Hale vs. Everett, 53 N. H. 9, 60.)

49 When a citizen does not bear arms without obstructing the prosecution of a war or attempting to influence others, there is no act against society. The Government will not go to the extent of forcing a citizen with conscientious or religious scruples to take up arms and commit what seem offenses to that citizen entering into warfare. The Supreme Court has said that this is a "religious Nation" (Church of the Holy Trinity vs. United States, 143 U. S. 458, 470) and that "the genius and character of our institutions are peaceful" (Fleming vs. Page, 9 How. (50 U. S.) 602, 614).

A person's declination to bear arms is not an act against peace and good order, nor contrary to the Constitution and laws of the United States, if such refusal be based upon conscientious scruples against the practice. Membership in a sect whose religious principles forbid bearing arms in warfare may be strong evidence of possessing conscientious scruples against warfare, but it is not essential to one having religious scruples asserting refusal to military service if such scruples be honestly held. (Davis vs. Beason, 133 U. S. 333; Mormon Church vs. United States, 136 U. S. 1.)

An examination of the stipulation of facts in this record justifies the argument of the appellant that his qualified answer to question No. 22 is intended only to preserve to him the right to exercise his conscientious or religious scruples when a war is declared and he is asked to bear arms. As we have seen, this is not in disobedience of the Constitution or the laws of the land.

50 No more is demanded of an alien who becomes a citizen than a natural-born citizen, and when an alien becomes a citizen he is accorded all the rights and privileges afforded to a natural-born citizen except eligibility to the presidency. (Osborn vs. U. S. Bank, 22 U. S. 737; Boyd vs. Thayer, 143 U. S. 135; Luria vs. United States, 231 U. S. 9; Tutun vs. United States, 270 U. S. 568.)

The question presented here differs from that presented in the case of Schwimmer vs. United States, supra. She stated she was an absolute atheist and said: "I am not willing to bear arms," but she was willing to do everything that an American citizen must do except fight. This applicant was willing to bear arms and reserved merely the right to determine for himself only whether the war was justified according to the dictates of his conscience. Mrs. Schwimmer said she was an uncompromising pacifist and was found to have no sense of nationalism but only a cosmic sense of belonging to the human family and opposed the use of military force as admitted by the Constitution and by the laws. She had "no nationalistic feeling." The appellant, on the other hand, was willing to give the United States "all the allegiance he ever had given or could give to any country," but that he would not put allegiance to the government of any country before his "allegiance to the will of God." This appellant, from his answers, indicates an upright sense of obligation to his God and has carefully explained his willingness to be a citizen of the United States, assuming the responsibilities and obligations of its form of government, and at the same time he has a high regard for his general duty to humanity. He wishes to keep pure his religious scruples.

51 Appellant's application for citizenship should have been granted. The order is reversed with directions to the District Court to admit appellant to citizenship.

Order reversed.

52 In United States Circuit Court of Appeals, Second Circuit

DOUGLAS CLYDE MACINTOSH, PETITIONER-APPELLANT

v.

UNITED STATES, RESPONDENT-APPELLEE

Judgment

Filed July 7, 1930

Appeal from the District Court of the United States for the District of Connecticut

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Connecticut and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby, is reversed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

53 [Clerk's certificate to foregoing transcript omitted in printing.]

54 Supreme Court of the United States

Order allowing certiorari

Filed November 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 35426. U. S. Circuit Court of Appeals, Second Circuit. Term No. 504. The United States, petitioner, vs. Douglas Clyde Macintosh. Petition for a writ of certiorari and exhibit thereto. Filed October 7, 1930. File No. 35426.

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No. 504

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

v.

DOUGLAS CLYDE MACINTOSH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. —

THE UNITED STATES, PETITIONER

v.

DOUGLAS CLYDE MACINTOSH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on July 7, 1930.

QUESTION PRESENTED

Whether an alien who, upon his examination in court, stated that he would be unwilling to bear arms in defense of the United States unless he believed "that the war was morally justified," and who reserved to himself the right to judge the necessity for taking up arms, is entitled to naturalization.

STATUTE INVOLVED

Section 4 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596 (U. S. C., Title 8, Sections 372, 381, and 382), reads in part as follows:

> That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:
>
> * * * * *
>
> *Third.*—He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.
>
> *Fourth.*—It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well dis-

posed to the good order and happiness of the same * * *.

STATEMENT

The respondent, a Canadian citizen, originally entered this country in 1904. In 1907 he was ordained as a Baptist preacher, whereupon he returned to Canada for two years. In 1909 he returned to the United States as a member of the faculty of Yale University, and soon thereafter declared his intention to become a citizen of the United States. (R. 14–15.) He served as a Canadian chaplain in the late war. (R. 15.) His war service apparently prevented the perfection of his American citizenship prior to the time when his original declaration under the Naturalization Act became invalid. (R. 16.) In February, 1919, he filed a new declaration of intention (R. 16), and on March 18, 1929, he filed in the United States District Court for the District of Connecticut his petition for naturalization (R. 7).

Questions 20 and 22 of the Preliminary Form for Petition for Naturalization executed by the respondent and the respondent's answers thereto are as follows (R. 5):

20. Have you read the following oath of allegiance? Yes.

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince,

potentate, state or sovereignty, and particularly to _____, of whom I have heretofore been a subject; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same."

Are you willing to take this oath in becoming a citizen? Yes.

22. If necessary, are you willing to take up arms in defense of this country? Yes; but I should want to be free to judge of the necessity.

In a memorandum submitted to the District Court and utilized at the hearing on the petition for naturalization, the respondent amplified his answers to questions 20 and 22 as follows (R. 11–12 and 17):

I wish to make clear the interpretations which I must put upon questions 19, 20 and 22 in the "Preliminary Form for Petition for Naturalization" if I am to be able to answer these questions in the affirmative. * * *

20 and 22. I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of humanity in the long run. I do *not* undertake to support "my country, right or wrong," in any dispute which may arise, and I am *not* willing to promise beforehand, and

without knowing the cause for which my country may go to war, either that I will or that I will not "take up arms in defence of this country," however "necessary" the war may seem to be to the government of the day. It is only in a sense consistent with these statements that I am willing to promise to "support and defend" the government of the United States "against all enemies foreign and domestic." But, just because I am not certain that the language of questions 20 and 22 will bear the construction I should have to put upon it in order to be able to answer them in the affirmative, I have to say that I do not know that I can say "Yes" in answer to these two questions. * * *

Further elaborating his views at the hearing the respondent stated (R. 19)—

That he would answer question 22 in the affirmative only on the understanding that he would have to believe that the war was morally justified before he would take up arms in it or give it his moral support.

The "Statement of Facts" further recites that (p. 21–22):

* * * while the applicant did not anticipate engaging in any propaganda against the prosecution of a war which the government had already declared and which it considered to be justified, he preferred not to make any absolute promise at the time of the hearing because of his ignorance of all the circumstances which might affect his

judgment in reference to such a war. In any case he did not question that the government, under certain conditions, could regulate and restrain the conduct of the individual citizen even to the extent of imprisonment. The applicant recognized the principle of the submission of the individual citizen to the opinion of the majority in a democratic country but he did not believe in having his own moral problems solved for him by the majority. The applicant testified that the position taken was the only one he could have taken consistently with his moral principles and with what he understood to be the moral principles of Christianity.

* * * * *

In short, while he recognized the right of the government to restrain the freedom of the individual for the good of the social whole, he was convinced, on the other hand, that the individual citizen should have the right respectfully to withhold from the government his military services (involving, as they probably would, the taking of human life), when his best moral judgment would compel him to do so. The applicant was willing to support his country even to the extent of bearing arms, if asked to do so by the government, in any war which he could regard as morally justified.

The District Court denied the petition for naturalization on the ground that respondent's views with respect to bearing arms indicated he was "not

attached to the principles of the Constitution." (R. 27.) On appeal the judgment was reversed by the Circuit Court of Appeals (R. 45) on the ground that "the refusal to perform military service on account of religious scruples has not been regarded as inconsistent with the duties and obligations of citizenship" (R. 42).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In reversing the judgment of the trial court.

2. In holding that the respondent was entitled to be admitted to citizenship.

3. In holding that the statutory requirements for naturalization were met by the respondent's qualified acceptance of the oath of allegiance prescribed by Section 4 of the Naturalization Act.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is apparently in conflict with the decision of this Court in *United States* v. *Schwimmer*, 279 U. S. 644.

2. Because of the large alien population residing in the Second Circuit, the decision of the Circuit Court of Appeals opens the way for the creation of a class of citizens who reserve to themselves the right to determine whether any future war in which the United States is involved deserves their moral support and justifies their taking up arms in defense of the United States.

3. The decision of the Circuit Court of Appeals authorizes admission to citizenship upon a declaration of conditional or qualified acceptance of the oath required by Section 4 of the Naturalization Act.

4. A review of the decision of the court below is of importance in the administration of the Naturalization Act.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1930.

BRIEF IN SUPPORT OF PETITION

OPINION BELOW

The District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 40–44) has not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered on July 7, 1930. (R. 45.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTE INVOLVED, ETC.

A statement of the question presented, statute involved, assignment of errors relied upon, and a statement of the case will be found in the petition.

ARGUMENT

Section 8, Article I, of the Constitution of the United States provides that Congress shall have power "to establish a uniform Rule of Naturalization."

Section 4 of the Naturalization Act of June 29, 1906 (p. 2, *supra*), provides:

> That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise: * * *.

The third subdivision of this Section (p. 2, *supra*) provides that an applicant for naturalization—

> * * * shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; *that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.* (Italics ours.)

It has been repeatedly held that the right of an alien to acquire citizenship is purely statutory and that citizenship will not be granted to an alien unless there has been strict compliance with the statutory requirements. *Maney* v. *United States,* 278 U. S. 17, 22; *Zartarian* v. *Billings,* 204 U. S. 170, 175; *United States* v. *Ginsberg,* 243 U. S. 472, 475; *Iuria* v. *United States,* 231 U. S. 9, 23; *Johannessen* v. *United States,* 225 U. S. 227, 240; *United States* v. *Ness,* 245 U. S. 319.

In *Johannessen* v. *United States, supra,* this Court quoted with approval the following language (p. 240):

> An alien friend is offered under certain conditions the privilege of citizenship. He

> may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred.

The same principle was enunciated in the *Ginsberg case, supra*, where this Court said (p. 474):

> An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

Although in his preliminary petition for naturalization the respondent said he was willing to take the oath required by the statute, he qualified his promise to "support and defend the Constitution and laws of the United States" by saying that he would take up arms in defense of the United States only when he deemed this necessary. In explanation of his "acceptance" of the statutory oath, the respondent said (R. 11–12.):

> I do *not* undertake to support "my country, right or wrong," in any dispute which may arise, and I am *not* willing to promise beforehand, and without knowing the cause for which my country may go to war, either

that I will or that I will not "take up arms in defence of this country," however "necessary" the war may seem to be to the government of the day. It is only in a sense consistent with these statements that I am willing to promise to "support and defend" the government of the United States "against all enemies foreign and domestic."

Not only did the respondent reserve to himself the right to determine the necessity for taking up arms in defense of the United States but he also reserved to himself the right to determine whether he would engage in propaganda against the prosecution of any war which he might not deem morally justified. The "Statement of Facts" shows that (R. 21):

> * * * while the applicant did not anticipate engaging in any propaganda against the prosecution of a war which the government had already declared and which it considered to be justified, he preferred not to make any absolute promise at the time of the hearing because of his ignorance of all the circumstances which might affect his judgment in reference to such a war.

Under the decisions cited the sole question to be determined is whether the respondent has met the requirements of the statute. We submit that the respondent's qualified oath of allegiance does not satisfy the Naturalization Act. In *United States* v. *Schwimmer*, 279 U. S. 644, this Court said (p. 650):

> That it is the duty of citizens by force of arms to defend our government against all

enemies whenever necessity arises is a fundamental principle of the Constitution.

The common defense was one of the purposes for which the people ordained and established the Constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arming and disciplining the militia, and for calling it forth to execute the laws of the Union, suppress insurrections and repel invasions; it makes the President commander in chief of the army and navy and of the militia of the several States when called into the service of the United States; it declares that a well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed. We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws by armed citizens. * * *

* * * * * *

Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number

> of citizens oppose such defense the "good order and happiness" of the United States can not long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms.

The foregoing decision negatives the contention of the respondent that he is entitled to citizenship although he refuses to bear arms in defense of the United States unless he is able to satisfy himself that the particular war is necessary or morally justified. If, as said by this Court in the *Selective Draft Law Cases*, 245 U. S. 366, 378, "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it," there is no basis for the contention that a prospective citizen may reserve to himself the right to determine the need or the moral justification for such miltary service.

The court below sustained the respondent's claim to citizenship on the ground that the refusal to perform military service on account of religious scruples has not been regarded as inconsistent with the duties of citizenship, and that no more is demanded of an alien who becomes a citizen than of a natural-born citizen. We submit that these considerations are irrelevant. The test is not what rights are per-

mitted to citizens after citizenship has been acquired but what requirements are imposed by the naturalization statutes. The fact that Congress in enacting the Selective Draft Law, or in prior legislation, provided that persons who were already citizens and as members of religious sects had conscientious scruples against military service should be given noncombatant duties does not indicate a legislative intent in the Naturalization Act that aliens who reserve to themselves the right to determine when military service should be rendered, or the right to determine when war shall receive their moral support, shall be admitted to citizenship. Those conscientious objectors whom we have among our citizens are dealt with in the best way possible, but the naturalization statutes afford no ground for inferring that Congress intended to show the slightest tolerance for the individual views of alien applicants which might interfere with full and complete performance of the duties of citizenship. See *In re Roeper*, 274 Fed. 490 (D. Del.).

The attitude of Congress as to admission to citizenship and military service is indicated by the Act of July 9, 1918, c. 143, 40 Stat. 845, 885 (U. S. C., Title 8, Sec. 366):

> That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the

President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States.

The Naturalization Act requires that "it shall be made to appear to the satisfaction of the court admitting any alien to citizenship" that he has the prescribed qualifications. The District Court was not satisfied with the proof submitted by the respondent and denied him citizenship. It may not be said as a matter of law that the respondent conclusively established his right to admission and therefore the Circuit Court of Appeals was without authority to substitute its judgment for that of the District Court. On this point this Court said in the *Schwimmer case* (p. 649):

> Every alien claiming citizenship is given the right to submit his petition and evidence in support of it. And, if the requisite facts are established, he is entitled as of right to admission. On applications for naturalization, the court's function is "to receive the testimony, to compare it with the law, and to judge on both law and fact." *Spratt* v. *Spratt*, 4 Pet. 393, 408. We quite recently declared that: "Citizenship is a high privilege and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant." *United States* v.

Manzi, 276 U. S. 463, 467. And when, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.

See also *Petition of Robert Clarke*, decided by the Supreme Court of Pennsylvania on June 21, 1930 (Western District, No. 56, March Term, 1930; unreported), in which case naturalization was denied because the applicant desired to add to the oath of allegiance the words "so far as they are in accord with the moral law of Jesus Christ."

CONCLUSION

Under the decision of this Court in the *Schwimmer case*, it seems clear that the court below erred in reversing the judgment of the District Court and in directing that the respondent be admitted to citizenship. The question involved is one of general importance, and it is respectfully submitted that the petition for a writ of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.
NUGENT DODDS,
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Attorneys.

OCTOBER, 1930.

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No. 504

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

v.

DOUGLAS CLYDE MACINTOSH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 504

THE UNITED STATES, PETITIONER

v.

DOUGLAS CLYDE MACINTOSH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 20) is reported in 42 F. (2d) 845.

JURISDICTION

The judgment sought to be reviewed was entered on July 7, 1930. (R. 26.) Petition for certiorari was granted by this Court on November 24, 1930. (R. 26.)

QUESTION PRESENTED

Whether an alien who, upon his examination in court, stated that he would be unwilling to bear

arms in defense of the United States unless he believed "that the war was morally justified," and who reserved to himself the right to judge the necessity for taking up arms, is entitled to naturalization.

STATUTE INVOLVED

Section 4 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596 (U. S. C., Title 8, Sections 372, 381, and 382), reads in part as follows:

> That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:
>
> * * * * * *
>
> *Third.* He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.
>
> *Fourth.* It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Terri-

tory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same * * *.

STATEMENT

The agreed statement of facts appears at pp. 9–14 of the record. They may be thus summarized:

The respondent, a Canadian citizen, originally entered this country in 1904. In 1907 he was ordained as a Baptist preacher, whereupon he returned to Canada for two years. In 1909 he returned to the United States as a member of the faculty of Yale University, and soon thereafter declared his intention to become a citizen of the United States. He served as a Canadian chaplain in the late war. His war service apparently prevented the perfection of his American citizenship prior to the time when his original declaration under the Naturalization Act became invalid. In February, 1919, he filed a new declaration of intention, and on March 18, 1929, he filed in the United States District Court for the District of Connecticut his petition for naturalization (R. 6–7).

Questions 20 and 22 of the Preliminary Form for Petition for Naturalization executed by the respondent and the respondent's answers thereto are as follows (R. 5):

20. Have you read the following oath of allegiance? Yes.

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to ----------, of whom I have heretofore been a subject; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same."

Are you willing to take this oath in becoming a citizen? Yes.

22. If necessary, are you willing to take up arms in defense of this country? Yes; but I should want to be free to judge of the necessity.

In a memorandum submitted to the District Court and utilized at the hearing on the petition for naturalization, the respondent amplified his answers to questions 20 and 22 as follows (R. 8):

I wish to make clear the interpretations which I must put upon questions 19, 20, and 22 in the preliminary form for petition for naturalization if I am to be able to answer these questions in the affirmative. * * *

20 and 22. I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of

humanity in the long run. I do *not* undertake to support "my country, right or wrong," in any dispute which may arise, and I am *not* willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not "take up arms in defence of this country," however "necessary" the war may seem to be to the Government of the day. It is only in a sense consistent with these statements that I am willing to promise to "support and defend" the Government of the United States "against all enemies foreign and domestic." But, just because I am not certain that the language of questions 20 and 22 will bear the construction I should have to put upon it in order to be able to answer them in the affirmative, I have to say that I do not know that I can say "Yes" in answer to these two questions. * * * (Italics ours.)

* * * * *

The petitioner at the hearing before the court testified that the statements contained in said memorandum as to the interpretation he wished to place on questions 19, 20, and 22 in the preliminary form for petition for naturalization expressed the views he held upon these matters, but he further explained that he was not inclined to emphasize the latter part of his statement in connection with question 19, and that he believed that any changes he might think desirable in the form of government

should be made only by legal and constitutional means. He further declared that he was not a pacifist, and that if allowed to interpret the oath of allegiance for himself—and he added that no one could be expected to take it without interpreting it—he would interpret it as not inconsistent with his position and would take this oath.

Further elaborating his views at the hearing the respondent stated (R. 12)—

> * * * that he would answer question 22 in the affirmative only on the understanding that he would have to believe that the war was morally justified before he would take up arms in it or give it his moral support.

The "Statement of Facts" further recites that (R. 13):

> * * * while the applicant did not anticipate engaging in any propaganda against the prosecution of a war which the Government had already declared and which it considered to be justified, he preferred not to make any absolute promise at the time of the hearing because of his ignorance of all the circumstances which might affect his judgment in reference to such a war. In any case he did not question that the Government, under certain conditions, could regulate and restrain the conduct of the individual citizen even to the extent of imprisonment. The applicant recognized the principle of the submission of the individual citizen to the opinion of the majority in a demo-

> cratic country, but he did not believe in having his own moral problems solved for him by the majority. The applicant testified that the position taken was the only one he could have taken consistently with his moral principles and with what he understood to be the moral principles of Christianity.
>
> * * * * *
>
> In short, while he recognized the right of the Government to restrain the freedom of the individual for the good of the social whole, he was convinced, on the other hand, that the individual citizen should have the right respectfuly to withhold from the Government his military services (involving, as they probably would, the taking of human life), when his best moral judgment would compel him to do so. The applicant was willing to support his country even to the extent of bearing arms, if asked to do so by the Government, in any war which he could regard as morally justified.

The District Court denied the petition for naturalization on the ground that respondent's views with respect to bearing arms indicated he was "not attached to the principles of the Constitution." (R. 16.) On appeal the judgment was reversed by the Circuit Court of Appeals (R. 26) on the ground that "the refusal to perform military service on account of religious scruples has not been regarded as inconsistent with the duties and obligations of citizenship" (R. 22).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In reversing the judgment of the trial court.

2. In holding that the respondent was entitled to be admitted to citizenship.

3. In holding that the statutory requirements for naturalization were met by the respondent's qualified acceptance of the oath of allegiance prescribed by Section 4 of the Naturalization Act.

SUMMARY OF ARGUMENT

The Naturalization Act requires that a candidate for citizenship by naturalization shall take a prescribed statutory oath and also satisfy the court admitting the alien to citizenship that he is, and has been for five years at least, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same.

The respondent refused to take the statutory oath required by the Naturalization Act without qualification or reservation, and insisted upon reserving for his own future decision whether or not he would bear arms in any war in which the United States might be engaged.

The respondent also failed to satisfy the District Court that he was attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same.

There is no valid distinction between this case and *United States* v. *Schwimmer*, 279 U. S. 644.

ARGUMENT

The opinion of the Circuit Court of Appeals below appears to proceed upon the theory that the respondent's qualified unwillingness, if admitted to citizenship, to bear arms in defense of the United States, was based upon his conscientious or religious scruples, and that this distinguished his case from *United States* v. *Schwimmer*, 279 U. S. 644. The court below reviewed extensively the historical background of the doctrine of freedom of conscience and religious freedom as applied to the obligations of citizens to bear arms. Its view seems to have been that since once admitted to citizenship a naturalized citizen (except as to eligibility for the Presidency) stands upon the same footing as a native born citizen, his conscientious or religious scruples against bearing arms prior to naturalization should be as tenderly regarded as if he were a citizen.

The court failed entirely to recognize the fact that the respondent could be admitted to citizenship only by compliance with the provisions of the Naturalization Act, which do not make any exceptions in favor of those unwilling to take the required oath because of conscientious or religious scruples, or for any other reason. Disregarding entirely the unwillingness of the respondent to take the statu-

tory oath without reservation or qualification, the court below appears to have considered that the respondent would make a desirable citizen, and upon this basis it overruled the District Court, which had the ultimate responsibility of deciding whether it satisfactorily appeared that the respondent met the requirements of Section 4 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596 (U. S. C., Title 8, Sec. 382). Since the respondent had failed to comply with the statutory requirements enacted by Congress as a prerequisite to naturalization, it is submitted that the District Court was right in refusing to admit the respondent to citizenship.

The assumption in the opinion of the court below that the respondent refused to bear arms in defense of this country because of conscientious or religious scruples is hardly justified by the record. The stipulated facts (R. 9 *et seq.*) and his answers to questions 20, 21, and 22 (R. 5), disclose a willingness to bear arms if he is able to satisfy himself "that the war was morally justified." (R. 12.) But he insists upon the reserved right to determine that matter for himself. (R. 5.) Thus he is not opposed to all war or combatant service on the ground of conscientious or religious scruples. The position of respondent is merely that of a highly educated man with that deep sense of right and wrong which every applicant for citizenship is presumed to possess, seeking to transfer from Con-

gress to himself, the right to determine whether the defense of this country requires him to bear arms. According to his own record statements there is no claim of conscientious or religious views that sets him apart from every other applicant for citizenship, and the granting of the right he claims would seem to require that such right be accorded every other otherwise qualified applicant. If this were done the constitutional power of Congress to declare war and raise and support armies would become impotent.

In the light of the foregoing introductory statement, we approach the consideration of the applicable law and decisions for the purpose of determining whether any power is confided to a court exercising naturalization functions to admit to citizenship one who, like respondent, not only demands the right to determine for himself the future necessity for his bearing arms in defense of this country, but who also reserves the right to determine whether he would engage "in any propaganda against the prosecution of a war which the Government had already declared and which it considered to be justified." (R. 13.)

Section 8, Article I, of the Constitution of the United States provides that Congress shall have power "to establish a uniform Rule of Naturalization."

Section 4 of the Naturalization Act of June 29, 1906 (p. 2, *supra*), provides:

> That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise: * * *.

The third subdivision of this section (p. 2, *supra*) provides that an applicant for naturalization—

> * * * shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; *that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.* (Italics ours.)

It has been repeatedly held that the right of an alien to acquire citizenship is purely statutory and that citizenship will not be granted to an alien unless there has been strict compliance with the statutory requirements. *Maney* v. *United States*, 278 U. S. 17, 22; *Zartarian* v. *Billings*, 204 U. S. 170, 175; *United States* v. *Ginsberg*, 243 U. S. 472, 475; *Luria* v. *United States*, 231 U. S. 9, 23; *Johannessen* v. *United States*, 225 U. S. 227, 240; *United States* v. *Ness*, 245 U. S. 319.

In *Johannessen* v. *United States*, *supra*, this Court quoted with approval the following language (p. 240):

> "An alien friend is offered under certain conditions the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred."

The same principle was enunciated in the *Ginsberg case*, *supra*, where this Court said (p. 474):

> An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

Although in his preliminary petition for naturalization the respondent said he was willing to take the oath required by the statute, he qualified his promise to "support and defend the Constitution and laws of the United States" by saying that he would take up arms in defense of the United States only when he deemed this necessary. In

explanation of his "acceptance" of the statutory oath, the respondent said (R. 8):

> I do *not* undertake to support "my country, right or wrong" in any dispute which may arise, and I am *not* willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not "take up arms in defence of this country," however "necessary" the war may seem to be to the Government of the day. It is only in a sense consistent with these statements that I am willing to promise to "support and defend" the Government of the United States "against all enemies foreign and domestic." (Italics ours.)

Not only did the respondent reserve to himself the right to determine the necessity for taking up arms in defense of the United State but he also reserved to himself the right to determine whether he would engage in propaganda against the prosecution of any war which he might not deem morally justified. The "Statement of Facts" shows that (R. 13):

> * * * while the applicant did not anticipate engaging in any propaganda against the prosecution of a war which the Government had already declared and which it considered to be justified, he preferred not to make any absolute promise at the time of the hearing because of his ignorance of all the circumstances which might affect his judgment in reference to such a war.

Under the decisions cited the sole question to be determined is whether the respondent has met the requirements of the statute.

There were two respects in which he failed to do so. He refused to take the oath of allegiance, as required by the Naturalization Act, without qualification or mental reservation. He also failed to satisfy the District Court that he was and had been for five years at least, "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same." The oath required by the Naturalization Act, before an alien can be admitted to citizenship, is simple and unambiguous. Congress has not provided that it may be qualified in a particular case because of conscientious or religious scruples, or for any other reason. As an oath it must be taken without mental reservations, for, with them, the sanction implicit in an oath is gone.

The respondent refused to take the oath without qualification or reservation. While his form of petition for naturalization contained in Item 20 an affirmative answer to the question "Are you willing to take this oath in becoming a citizen?" the statement which he submitted in explanation of the affirmative (R. 8) shows its true character. He was unable to give an affirmative answer unless his interpretation of the oath was adopted. His interpretation of the oath left him free to use his own judgment, or follow his own conscience as to

what were the best interests of the United States. His judgment and conscience in this respect would be governed by his views as to the best interests of humanity. (R. 11.) It is difficult to conceive of a more vague and intangible basis for allegiance than this. Reference is made in the opinion below to the fact that the respondent performed noncombatant service in the last war. But we are not concerned with his willingness in the past to serve the sovereign to whom he has forsworn allegiance but with his new allegiance to the United States. It is not the degree or quality of qualification or reservation in taking the statutory oath which governs. Such an oath can not be taken with any qualifications or reservations if the statute is to be satisfied.

The decision of this Court in the *Schwimmer case*, 279 U. S. 644, supra, establishes that willingness to bear arms is an essential qualification for citizenship. In that case this Court said (p. 650):

> That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.
>
> The common defense was one of the purposes for which the people ordained and established the Constitution. It empowers Congress to provide for such defense, to declare war, to raise and support armies, to maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arm-

ing, and disciplining the militia, and for calling it forth to execute the laws of the Union, suppress insurrections and repel invasions; it makes the President commander in chief of the army and navy and of the militia of the several States when called into the service of the United States; it declares that a well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed. We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws by armed citizens. * * *

* * * * * *

Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the "good order and happiness" of the United States can not long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms.

The foregoing decision negatives the contention of the respondent that he is entitled to citizenship although he refuses to bear arms in defense of the United States unless he is able to satisfy himself that the particular war is necessary or morally justified. If, as said by this Court in the *Selective Draft Law Cases*, 245 U. S. 366, 378, "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it," there is no basis for the contention that a prospective citizen may reserve to himself the right to determine the need or the moral justification for such military service.

The court below sustained the respondent's claim to citizenship on the ground that the refusal to perform military service on account of religious scruples has not been regarded as inconsistent with the duties of citizenship, and that no more is demanded of an alien who becomes a citizen than of a natural-born citizen. We submit that these considerations are irrelevant. The test is not what rights are permitted to citizens after citizenship has been acquired but what requirements are imposed by the naturalization statutes. The fact that Congress in enacting the Selective Draft Law, or in prior legislation, provided that persons who were already citizens and as members of religious sects had conscientious scruples against military service should be given noncombatant duties does not indicate a

legislative intent in the Naturalization Act that aliens who reserve to themselves the right to determine when military service should be rendered, or the right to determine when war shall receive their moral support, shall be admitted to citizenship. Those conscientious objectors whom we have among our citizens are dealt with in the best way possible, but the naturalization statutes afford no ground for inferring that Congress intended to show the slightest tolerance for the individual views of alien applicants which might interfere with full and complete performance of the duties of citizenship. See *In re Roeper*, 274 Fed. 490 (D. Del.).

We are unable to detect any valid distinction between the facts in this case and the facts in the *Schwimmer case, supra*, and the attempt to distinguish between the cases contained in the opinion of the court below is not satisfactory. In the *Schwimmer case* the respondent stated that she was an atheist, and accordingly her refusal to bear arms was based upon scruples which may be described as conscientious rather than religious. In the present case, the respondent was not unwilling to bear arms if he considered war justifiable. Perhaps his scruples were religious as well as conscientious. But however the prompting motive may be described the respondent in each case reserved freedom to refuse to comply with the constitutional authority of Congress and of the President in case of war. In the *Schwimmer case* the respondent

described herself as "an uncompromising pacifist." She said that she was "always ready to tell anyone who wants to hear it that I am an uncompromising pacifist and will not fight. In my writings and in my lectures I take up the question of war and pacifism if I am asked for that."

While the present respondent declared he was not a pacifist, he desired to reserve the right to choose his own wars. While he stated that he did not anticipate engaging in any propaganda, he preferred not to make any absolute promise that he would not do so. (R. 13.) Mrs. Schwimmer declared that she had "no sense of nationalism, only a cosmic consciousness of belonging to the human family." This respondent indicated that "the international outlook he advocated would not mean the doing away of nationalism." (R. 12.) He was particularly concerned with the "true well-being of mankind in general." (R. 13.) One may admire or condemn the motives which inspired the refusal to bear arms in either case, but the fact remains that in each case the applicant was willing to assume only a qualified allegiance. The differences between the cases are therefore superficial, and if an unwillingness to bear arms in all wars disqualifies an alien for citizenship (as this Court held in the *Schwimmer case, supra*), the somewhat more discriminating unwillingness to bear arms of this respondent is an equal disqualification.

The attitude of Congress as to admission to citizenship and military service is indicated by the Act of July 9, 1918, c. 143, 40 Stat. 845, 885 (U. S. C., Title 8, Sec. 366):

> That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States.

The Naturalization Act requires that "it shall be made to appear to the satisfaction of the court admitting any alien to citizenship" that he has the prescribed qualifications. The District Court was not satisfied with the proof submitted by the respondent and denied him citizenship. It may not be said as a matter of law that the respondent conclusively established his right to admission and therefore the Circuit Court of Appeals was without authority to substitute its judgment for that of the District Court. On this point this Court said in the *Schwimmer case* (p. 649):

> Every alien claiming citizenship is given the right to submit his petition and evidence

in support of it. And, if the requisite facts are established, he is entitled as of right to admission. On applications for naturalization, the court's function is "to receive the testimony, to compare it with the law, and to judge on both law and fact." *Spratt* v. *Spratt,* 4 Pet. 393, 408. We quite recently declared that: "Citizenship is a high privilege and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant." *United States* v. *Manzi,* 276 U. S. 463, 467. And when, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.

Quite in point also is the carefully reasoned opinion in *In re Clarke,* 152 Atlantic, 92, by the Supreme Court of Pennsylvania. In that case citizenship was denied because the applicant insisted upon adding to the oath of allegiance the words "so far as they are in accord with the moral law of Jesus Christ." The appellate court said (p. 94):

> Appellant argues that he has a right to accompany the oath prescribed under the laws of the United States with the statement noted above, since it is not a qualification of the oath; but the decision of *United States* v. *Schwimmer,* 279 U. S. 644, 49 S.

Ct. 448, 73 L. Ed. 889, rules the case to the contrary. The act of 1906 requires that, before any one is admitted to citizenship, he shall declare on oath in open court that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same. The qualification, "so far as they are in accord with the moral law of Jesus Christ," would raise quite an independent thought. It carries with it the conviction that some of our laws are not in accord with the moral law of Jesus Christ, and these he will not support or defend. The difficulty with appellant's position is that he sets up his own conscience or will as the sole judge to determine what laws are not in accord with the moral law of Jesus Christ. We might point to laws contested with much vigor on this point.

It is for Congress alone to decide the form of the oath of allegiance, and, when it does so in language as clear, explicit, and unequivocal as that contained in the present oath, no court or judge can nor should permit any evasion of its terms. The oath is not one to be debated; its equilavent in other language is not a legitimate subject of discussion. It predicates a definite state of mind in those seeking admission. The naturalization clause is one of the most important provisions of the Constitution, as is the legislation thereunder. Judges, who accept into citizenship one who wishes to subtract from its declared requirements, or attempts to limit

or modify its intent, open the door for further infractions and anarchy may stalk in unmolested. No sophistry of illusionary reasoning can minimize the ordinary import of the oath. It would be much more in keeping with intellectual honesty to say openly that we do not regard Congress as being capable of enacting rules, or hold that, regardless of what is laid down, we think the applicant should be admitted to citizenship. If one desiring citizenship, holding views contrary to those prescribed by Congress for membership in the United States, may, because of superior education, age, or mental reservation, become a citizen nothwithstanding the rule, why have a rule at all? Admission would then depend on the inclination of the judge. It makes little difference what judges may think of the views of those seeking naturalization; Congress has pointed the way with unmistakable directness, and has declared that an applicant must agree under oath to support and defend the laws of the United States. It is for us to follow the law, not to legislate. The court below was clearly right in denying the applicant admission on the terms he wished to impose on the national government.

Certainly under the facts and the law it can not be said that respondent so clearly demonstrated his right to citizenship that the denial thereof by the District Court constituted reversible error. On the record the action of the Circuit Court of Appeals below would seem to be an attempt to substitute its

judgment for that which the Naturalization Act confides to the District Court. It is inconceivable that any naturalizing court may transfer from Congress to the citizen applicant the power to determine the necessity of war or the obligatory duty of the citizen to bear defensive arms.

In concluding its opinion in the *Schwimmer case, supra,* this Court said (p. 653):

> The language used by respondent to describe her attitude in respect of the principles of the Constitution was vague and ambiguous; the burden was upon her to show what she meant and that her pacifism and lack of nationalistic sense did not oppose the principle that it is a duty of citizenship by force of arms when necessary to defend the country against all enemies, and that her opinions and beliefs would not prevent or impair the true faith and allegiance required by the Act. She failed to do so. The District Court was bound by the law to deny her application.

Since respondent here refuses to recognize the "duty of citizenship," against his will, to defend the country against all enemies by force of arms, he has not clearly established his right to naturalization.

In conclusion we submit that in predicating its decision upon a ruling that there is no fixed principle of the Constitution of this country requiring a citizen with conscientious scruples against bearing arms to nevertheless bear arms in time of war

the court below fell into error—first, by ignoring the requirements of the statute upon which the right of naturalization is conditioned, and, second, by ignoring the fact that the respondent has no conscientious scruples against bearing arms generally but wishes to assume a qualified allegiance and to be excused from active participation in war if he believes the enemy's cause more just than that of the country to which he owes allegiance. Laws do not always run in step with conscientious or religious scruples, but they are nevertheless valid, and the remedy, if one be needed, lies with Congress, not in the conscience of the individual. Motives which preclude compliance with law, whether conscientious, religious, or sinful, are irrelevant when compliance is made the condition of a right.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals below should be reversed, and that of the District Court affirmed.

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CHARLES ELMORE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 504.

THE UNITED STATES,

Petitioner,

vs.

DOUGLAS CLYDE MACINTOSH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1930.

THE UNITED STATES, Petitioner, against DOUGLAS CLYDE MACINTOSH, Respondent.	No. 504.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The District Court filed no opinion; it did, however, enter a final decree stating therein its reasons for denying the application of the respondent for citizenship (R. 26-27). The opinion of the Circuit Court of Appeals (R. 40-44) has not yet been reported.

Jurisdiction.

The judgment sought to be reviewed was entered on July 7, 1930 (R. 45). On October 7, 1930, the petitioner filed a

petition for writ of certiorari and brief in support thereof in this Court, invoking its jurisdiction under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, U. S. C., Title 28, Sec. 347.

Question Presented.

This is a proceeding for naturalization. Respondent, a Canadian citizen, was denied citizenship by the United States District Court for the District of Connecticut. The sole ground for questioning his right to be admitted is thus set forth in the decree of the District Court (R. 27):

> "It appearing that the said Petitioner, considering his allegiance to be first to the will of God, would not promise in advance to bear arms in defense of the United States under all circumstances but only if he believed the war to be morally justified, it is
>
> Decreed, that the Petitioner is not attached to the principles of the Constitution of the United States and further decreed that said petition for citizenship is denied."

The Circuit Court of Appeals held this conclusion of the District Court to be erroneous, and reversed its decree, directing that the respondent be admitted to citizenship. The sole question presented is whether the respondent's refusal to make the unqualified promise required by the District Court peremptorily requires the denial of his application.

Statement of the Case.

The respondent, born on February 18, 1877, at Breadalbane, Ontario, Canada, first entered the United States in 1904 to become a graduate student at the University of Chicago (R. 1 and 4). While in this country in 1907, he was ordained as a Baptist minister (R. 14). After returning to Canada for two years, in 1909 he came to Yale University to teach

in its Divinity School, where he is now a member of the Faculty, Chaplain of the Yale Graduate School, and Dwight Professor of Theology (R. 14). In the spring of 1916 he voluntarily enlisted as a chaplain in the Canadian Army and went overseas, where he saw service at the front in the neighborhood of Vimy Ridge and in the battle of the Somme (R. 15). He returned to America late in the year 1916, and during the succeeding year made many public addresses in support of the Western Allies (R. 16). Joining the American Y. M .C. A., he again went to France in the spring of 1918, where he had charge of a Y. M. C. A. hut in the St. Mihiel region of the front until the Armistice was declared (R. 16).

On February 18, 1925, the respondent filed in the District Court of the United States at New Haven, Connecticut, a declaration of his intention to become a citizen (R. 1). On March 18, 1929, he filed in the same Court a preliminary form for petition for naturalization accompanied by the certificate of arrival issued by the Department of Labor (R. 2), and a petition for naturalization accompanied by the proper affidavits of witnesses (R. 7). In the preliminary form for petition for naturalization he signified his willingness to take the usual oath to support and defend the Constitution of the United States; but in answer to question 22 of that form, asking him whether he was willing to take up arms in defense of this country, he stated: "Yes, but I should want to be free to judge of the necessity" (R. 5).

On June 10, 1929, the respondent was given a preliminary hearing before the naturalization examiner. At this hearing he submitted a memorandum explaining more fully his answers to certain questions in the preliminary form, including his answer to question 22, above quoted (R. 11). In it he stated:

> "I am *not* willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not 'take up arms in

defence of this country,' however 'necessary' the war may seem to be to the government of the day" (R. 11).

As a consequence the naturalization examiner recommended that the petition be denied, giving as his reason "attachment to the principles of the Constitution not shown" (R. 25).

On June 24, 1929 he appeared before the Judge of the District Court. Since there was no stenographic record of the proceedings, counsel for the Government and for the respondent prepared a statement of the facts which were substantially presented to the Court at that hearing (R. 14). The respondent submitted to the Court a memorandum summarizing his war record (R. 12) and an excerpt from "Who's Who in America" (R. 13).

It was not until this final hearing before the District Court that the respondent explained his position in detail. There it appeared in response to a question asked him by the Judge, that his attitude was based upon religious convictions (R. 20). Without equivocation he stated to the Judge:

> "* * * that he was ready to give to the United States, in return for citizenship, all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God" (R. 20).

The respondent was willing and believed he could take the oath of allegiance without any alteration or qualification (R. 5 and 19). He stated unequivocally that he was not a pacifist, and that he believed in the use of armed force "in the exercise of police functions in national or international relations, and that there were circumstances under which such force could also be justifiably used, for instance, to repel invasion, or even to defend a weaker nation" (R. 23). He merely desired to explain to the Court that in some particular future war (that is, one which he believed to be

unjust and contrary to Christian principles), he might have conscientious religious scruples against bearing arms; and that he could not therefore give a blanket promise in advance to bear arms in any and all wars in which this country might engage. In the words of the Circuit Court of Appeals, he "wishes to keep pure his religious scruples" (R. 44).

This attitude of the respondent, the District Court believed, compelled it to deny the petition for naturalization (R. 26). The Circuit Court of Appeals took the opposite view.

Summary of Argument.

I. The decision of the Circuit Court of Appeals is not in conflict with that of this Court in *United States* v. *Schwimmer*, 279 U. S. 644.

II. In its ultimate analysis the sole issue is whether the respondent, in order to satisfy the requirements of the Naturalization Act, must promise in advance to bear arms in any and all future wars, even against his conscientious religious scruples.

III. Congress has never provided that an alien must be willing, as a condition of naturalization, to make such a promise in violation of his conscientious religious scruples.

IV. The Constitution and laws of the United States do not require that citizens with conscientious religious scruples should bear arms.

V. A promise to forego a privilege enjoyed by a native born citizen under the Constitution and laws of the United States cannot be exacted of an alien as a condition of his naturalization.

POINT I.

The decision of the Circuit Court of Appeals is not in conflict with that of this Court in *United States* v. *Schwimmer*, 279 U. S. 644.

A comparison of this respondent's petition for naturalization with that of Rosika Schwimmer discloses that the attitude, beliefs and opinions of the respondent differ completely and radically from those of Rosika Schwimmer. In no essential respect are they similar.

In fact the Government itself anticipated the fundamental difference between the two cases when it stated in its brief presented to this Court in *United States* v. *Schwimmer* that *"refusal to perform military service on account of religious scruples is not involved in this case"* (Government's Brief in No. 484, October Term, 1928, at p. 17). The respondent's primary desire was the protection of his right not to bear arms in a war which his conscience, dictated by the will of God, might consider to be morally unjustified. Therein lies the formula for the proper understanding of his answers and statements. In brief, his attitude is that of every intelligent Christian man or woman.

The second outstanding difference between the two cases is this: Rosika Schwimmer declared that she had "no sense of nationalism," "no nationalistic feeling," and "only a cosmic consciousness of belonging to the human family" (279 U. S. at page 648). This respondent, on the other hand:

> "stated further that he was willing to give to the United States, in return for citizenship, all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God. The applicant explained that if he were to be a citizen of the United States he would recognize special duties and

> obligations by virtue of that citizenship over and above his general duty to humanity as such. The applicant believed that the international outlook he advocated would not mean the doing away of nationalism" (R. 20).

We submit that no Christian of any denomination could promise more.

Again, Rosika Schwimmer declared that she "was willing to do everything that an American citizen has to do except fighting", and "I am not willing to bear arms" (279 U. S. at page 648). Dr. Macintosh, on the other hand voluntarily enlisted in the Canadian Army and subsequently in the American Army during the World War, and has shown, by deeds as well as by words, his willingness to defend our Government by force of arms. To question 22 of the preliminary form for naturalization, reading: "If necessary, are you willing to take up arms in defense of this country?", Dr. Macintosh answered affirmatively (R. 5). Rosika Schwimmer answered this same question as follows: "I would not take up arms personally" (279 U. S. at page 647).

And there is still another basic difference between the two cases. Rosika Schwimmer stated that she was "an uncompromising pacifist" (279 U. S. at page 648). This record, on the other hand, shows that

> "while devoted to the cause of peace, the applicant stated that he was not a pacifist in the ordinary sense of that term, because it did not seem to him that Christian principles required absolute pacifism on the part of all. * * * The applicant declared that he believed that there was a rightful place for the use of force by the army and navy in the exercise of police functions in national or international relations and that there were circumstances under which such force could also be justifiably used, for instance, to repel invasion, or even to defend a weaker nation. Since it would be neither wise nor right for the nation to adopt absolute and unconditional pacifism, the applicant did not believe any moral necessity rested upon him to adopt an unconditionally pacifist position" (R. 22-23).

In the light of these views we submit that there is no ground upon which this Court can reach the conclusion which it reached in *United States* v. *Schwimmer*, that the respondent "may be opposed to the use of military force as contemplated by our Constitution and laws" (279 U. S. at page 652).

The respondent, moreover, considers that a Christian citizen must decide for himself whether according to his conscience he would be morally justified in killing others in a particular war. He recognizes that two Christians may well reach different conclusions. Hence, although he might believe *he* would be violating the will of God in bearing arms in a particular war, he does not anticipate engaging "in any propaganda against the prosecution of a war which the Government had already declared and which it considered to be justified" (R. 21), or in altering the opinion of others. Even during a war which he might regard as unjustified, he stated that he would still regard himself as under moral obligation not to do anything that would injure his country (R. 20). His attitude is unquestionably that of a righteous, peace-loving, law-abiding member of society.

As a matter of fact, we submit that the respondent fully satisfies the test enunciated by this Court in *United States* v. *Schwimmer*. The core of that decision is that the applicant had failed to support the burden resting upon her to show that her uncompromising pacifism, her lack of nationalistic feeling, and her "cosmic sense of belonging to the human family" did not oppose "the principle that it is the duty of citizenship by force of arms when necessary to defend the country against all enemies" (279 U. S. at p. 653). If such is the test the respondent has met it; for he not only recognizes but favors that principle, and has proved his adherence to it by his acts. In no way did this Court intimate that an applicant for citizenship must without qualification declare his belief in the doctrine "My country right or

wrong", or that he must agree in advance to take up arms and fight in any and every war that may ever be declared, even if it violates his honest conscientious religious scruples.

POINT II:

In its ultimate analysis the sole issue is whether the respondent, in order to satisfy the requirements of the Naturalization Act, must promise in advance to bear arms in any and all future wars even against his conscientious religious scruples.

The Government in its brief (pp. 16-17) points out, as this Court said in *United States* v. *Schwimmer*, that if doubt remains in the mind of the Court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application for citizenship should be denied. We submit, however, that on the record of the petition for naturalization before this Court there is no room for doubt as to any "essential matter of fact". The sole issue is one of law.

The respondent did not refuse to take the oath of allegiance prescribed by the Naturalization Act and the regulations of the Department of Labor. He did not ask to alter its form nor did he think it necessary. In the preliminary form for petition for naturalization the respondent answered question 20 in the affirmative and without qualification (R. 5). The memorandum submitted by him (R. 11) contains no indication of a refusal to take the oath of allegiance in its present form. An examination of this memorandum discloses that its real and sole purpose was the clarification of his views on the bearing of arms. At the hearing before the District Court the respondent again stated that he would take the oath of allegiance (R. 19).

The Government now offers, as a reason for granting a writ of certiorari, the argument that the decision of the Circuit Court of Appeals authorizes admission to citizenship upon a declaration of conditional or qualified acceptance of the oath (Petition, p. 8). Similarly in its brief the Government contends that the respondent "qualified" his acceptance of the oath of allegiance (Brief, pp. 11 and 12). But since he respondent, unlike the petitioner in the *Clarke* case (Government's Brief, p. 17), did not request any verbal alteration or qualification of the oath of allegiance, obviously the only possible method by which he can be said to have "qualified" the oath was by his statement that he could not promise in advance to bear arms in an unjust war against his conscientious religious scruples. Hence, if the Constitution and laws of the United States do not in fact demand such a promise, there is no qualification.

The naturalization examiner in his recommendation (R. 24) and the Judge of the District Court (R. 26) have held that "attachment to the principles of the Constitution" requires that an alien give such a promise. The Circuit Court of Appeals, however, held that there is no "fixed principle of the Constitution of this country requiring a citizen, with conscientious or religious scruples against bearing arms, to nevertheless bear arms in time of war" (R. 42). This is the crux of the case.

POINT III.

Congress has never provided that an alien must be willing as a condition of naturalization to promise in advance to bear arms in any and all future wars even against his conscientious religious scruples.

As general requirements, Congress has provided that an applicant for naturalization must declare on oath in open court that "he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same" (U. S. C. Title 8, Sec. 381), and that "it shall be made to appear to the satisfaction of the court admitting any alien to citizenship that * * * he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same" (U. S. C. Title 8, Sec. 382).

Furthermore, Congress has at various times specifically legislated on the admissibility of certain aliens. It has declared the exclusion of Chinese, persons who disbelieve in or are opposed to organized government, polygamists, aliens who cannot speak the English language, and subjects of neutral countries who withdrew during the World War their intention to become citizens of the United States (U. S. C. Title 8, Secs. 363-366). But Congress has never provided that aliens with conscientious religious scruples against bearing arms must be excluded.

The sole provision of statute applicable to this case is the requirement that the respondent should be "attached to the principles of the Constitution" and that he should declare his willingness to support and defend it against all enemies. That this requirement includes, in a proper case, an expres-

sion of willingness to defend the Government by force of arms is undisputed. But there is no requirement of statute that an applicant having conscientious religious scruples against bearing arms either in some particular war (such as this applicant) or in all wars (as would be the case, for example, with any conscientious Quaker) should promise in advance to abandon those scruples and should agree without qualification to bear arms in any and every case.

The Secretary of Labor, whom Congress vested with the power to make rules and regulations necessary for the proper execution of the provisions of the naturalization laws (U. S. C. Title 8, Sec. 356) has recently introduced question 22 in the preliminary form for petition for naturalization (R. 5). Although this Court, in the *Schwimmer* case, apparently approved its insertion, we nevertheless emphasize that that question is merely informative as to whether an applicant is attached to the principles of the Constitution. It has no other purpose. In order to be entitled to naturalization, the respondent is not required by any provision of law to give to that question an unqualified categorical affirmative answer.

As the Circuit Court of Appeals said (R. 42):

> "An inquiry as to whether he will willingly bear arms is a proper inquiry to ascertain where the applicant stands in the test thus laid down by the naturalization law, but it does not follow because the applicant did not answer question No. 22 categorically but qualified his answer by the statements referred to, that he has not complied with the requirements of the naturalization law entitling him to admission. Question 22 is merely informative and necessarily directed to determine whether the applicant is attached to the principles of the Constitution and laws of the United States. It will, of course, be recognized as a duty of the citizen to bear arms in defense of his country, but there is also the well recognized qualification that a person does not lack nationalism or affection for his government, if, by reason of a conscientious religious scruple, he requests being excused from bearing arms."

POINT IV.

The Constitution and laws of the United States do not require that citizens with conscientious religious scruples should bear arms.

A careful study of statutes and constitutions from the earliest Colonial times to the present discloses that it has always been the settled policy of the United States and of the several states to exempt citizens having religious scruples from the duty of bearing arms in violation of those scruples. The authorities upon this point were fully collated in our brief before the Circuit Court of Appeals, and some of them are cited in the opinion of that Court at Record 42-44. Within the limits of this brief, we shall give merely an outline.

The militia statutes of the thirteen Colonies generally allowed a citizen to obtain a substitute or pay a special tax in lieu of rendering personal service, thereby obviating the necessity of special provisions with respect to citizens having religious scruples. In addition, however, the Colonial legislation of New Hampshire, New York, North Carolina, Massachusetts and Virginia specifically exempted Quakers and members of other religious sects having scruples against bearing arms (N. H. 4 Metcalf, 273, 274; Colonial Laws of New York, Vol. 4, p. 17; State Records of North Carolina, Vol. 24, pp. 193 and 358; Acts and Resolves of Mass., 1758-9, Vol. 4, Ch. 3, p. 158; Virginia, 5 Hening, p. 16). Similarly the Draft Acts enacted by the original States to recruit the Continental Army usually provided that a person could either find a substitute or pay a reasonable sum or tax. Furthermore, some of those Acts dealt specifically with persons having scruples (State Records of North Carolina, Vol.

24, p. 156; Penn. Statutes at Large, Vol. 13, p. 41; Virginia, 8 Hening, p. 242). Several of the State Constitutions enacted previous to the adoption of the Federal Constitution granted to such citizens the privilege of not bearing arms. See Constitutions of New Hampshire of 1784, Vermont of 1777, New York of 1777 and Pennsylvania of 1776. (Thorpe, American Charters, etc., Vol. 4, p. 2455, Vol. 6, p. 3740, Vol. 5, p. 2637, Vol. 5, p. 3083, respectively).

Although the Constitution of the United States contains no express provision protecting a citizen with conscientious religious scruples against bearing arms, the ratifications by the original States clearly show that it was considered a privilege under our form of government that such a citizen should not be forced to bear arms (Journals of Congress, Vol. 13, 1787-1789, pp. 174-176, and 185-187). In response to the urgent demand of the States that the more fundamental rights of the people should be expressly protected by the Constitution, Madison, on June 8, 1789, presented to the House a list of amendments including the provision that "no person feligiously scrupulous of bearing arms shall be compelled to render military service in person" (Gales, Annals of Congress, First Congress, Vol. 1, p. 434).

As a result of unavoidable compromise in language and of a desire for brevity, which usually means broad, general terms, the suggestions that the Constitution should expressly protect the "unalienable right to the free exercise of religion, according to the dictates of conscience", "the rights of conscience" and the rights of a "person religiously scrupulous of bearing arms" were merged and incorporated in Article I of the Bill of Rights. Furthermore, it should not be forgotten that Article IX expressly provided that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Supreme Judicial Court of New Hampshire in *Hale* v.

Everett, 53 N. H. 9, 60-61, held the rights of conscience to be inalienable. See also Story, Constitution, Vol. 2, Section 1876.

A review of the Federal legislation and Congressional debates in regard to the raising of a militia and the conscription of soldiers further proves that the Constitution and laws of the United States have always recognized that persons having religious scruples against bearing arms need not do so. This is true of the Act of Jan. 21, 1903 (32 Stat. 775), the Act of June 3, 1916 (39 Stat. 197; U. S. C., Title 32, Sections 1 and 3), and the Selective Draft Act of 1917 (40 Stat. 78, U. S. C., Title 50, pp. 167-8). The same principle has been recognized time and again by the statutes and Constitutions of the several states. (See opinion of the Circuit Court of Appeals at R. 42-43). At the present time, so far as we have been able to discover, in all of the states except California, Vermont and Washington, the statutes either provide that all persons exempted by the laws of the United States (which grant a privilege to persons having conscientious religious scruples) are likewise exempted from service in the state militia, or else they declare specifically that persons having conscientious religious scruples shall not be compelled to bear arms. In Vermont such a statutory provision is unnecessary, for the State Constitution grants the same privilege.

In conclusion, we submit that while on the one hand our Constitution gives the Government the right to compel military service from its citizens (*Selective Draft Cases*, 245 U. S. 366), the Constitution and laws of the United States also recognize that alongside this general principle exists an exception—a privilege that persons with conscientious religious scruples need not bear arms.

The decisions of this Court interpreting the First Amendment of the Constitution support our contention. What constitutes "free exercise" of religion cannot be ultimately determined. It is a case where the Court must prick out a line,—here one between conscience and the command of the State.

In *Reynolds* v. *United States*, 98 U. S. 145, which first presented the issue, this Court adopted the test suggested by Jefferson in the act establishing religious freedom in Virginia, namely, that "an overt act against peace and good order" can be prohibited by the State. See also *Davis* v. *Beason*, 133 U. S. 333, 342; *Mormon Church* v. *United States*, 136 U. S. 1, 49-50. Applying this test, we submit that the Circuit Court of Appeals was correct when it said (R. 44):

> "A person's declination to bear arms is not an act against peace and good order, nor contrary to the Constitution and laws of the United States, if such refusal be based upon conscientious scruples against the practice."

In *State* v. *Hutterische Bruder Gemeinde*, 46 S. D. 189; 191 N. W. 635, the Court expressly recognized that our Constitution grants a person with conscientious religious scruples the privilege of not being forced to bear arms. We have found no cases excluding such persons from naturalization.

POINT V.

A promise to forego a privilege enjoyed by a native born citizen under the Constitution and laws of the United States cannot be exacted of an alien as a condition of his naturalization.

While it is true that there are two classes of citizens, native born and naturalized, nevertheless a naturalized citizen enjoys all the privileges of a native born citizen with the sole exception of eligibility to the office of President.

Osborn v. *United States Bank*, 9 Wheat. 738, 827;
Elk v. *Wilkins*, 112 U. S. 94, 101;
Luria v. *United States*, 231 U. S. 9.

It is a current conception that the naturalization of an alien is the granting of a privilege. The brief of the Government in support of its petition reiterates this idea (p. 11). Yet once Congress has prescribed the terms and conditions which an alien must satisfy in order to become a citizen, the alien has a right of which no court can deprive him. A court, in passing upon a petition for naturalization, "does not confer or withhold a favor."

Tutun v. *United States*, 270 U. S. 568, 578.

In refusing to give a blanket promise to bear arms in some indefinite future war from which his conscience dictated by the will of God may urge him to refrain, the respondent is not demanding a privilege or a favored position not enjoyed under our Constitution. This an alien cannot ask. On the other hand, we submit that Congress cannot exact from an alien at the time of his naturalization a promise that he will forego a privilege granted by the Constitution and laws of the United States. The power of Congress in dealing with naturalization is not unshackled.

Osborn v. *United States Bank*, 9 Wheat. 738, 827;
United States v. *Wong Kim Ark*, 169 U. S. 649, 703;
Downes v. *Bidwell*, 182 U. S. 244, 289;
Pollock v. *Farmers' Loan and Trust Company*, 157 U. S. 429.

To demand from an alien who desires to be naturalized an unqualified promise to bear arms in every war that may be declared, despite the fact that he may have conscientious religious scruples against doing so in some hypothetical future case, would mean that such an alien would come into

our citizenry on an unequal footing with the native born, and that he would be forced, as the price of citizenship, to forego a privilege enjoyed by others. That is the manifest result of the established principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so.

That such a demand would be improper becomes apparent from a consideration of other situations. For instance, Congress would be clearly violating provisions of the Constitution if, in providing for a uniform rule of naturalization, it should require an alien to promise that once he becomes a citizen he will not be entitled to the privilege of holding political office or to the right of free speech or to the right to be secure against unreasonable searches and seizures, or to the protection of the due-process clause.

We fail to understand the statement of the Government (Brief, p. 14) that the principal enunciated by the Circuit Court of Appeals that no more is demanded of an alien who becomes a citizen than of a native born citizen is an irrelevant consideration. As we have pointed out, to allow the contention of the Government would give rise to two classes of citizens having unequal status and unequal privileges before the law. We submit that our Constitution does not contemplate or permit the creation and existence of such classes of citizens, enjoying different rights and privileges and subject to different duties and obligations.

CONCLUSION.

Under the circumstances of this case, we submit that it is idle for the Government to argue that the decision of the Circuit Court of Appeals in any way conflicts with the decision of this court in the *Schwimmer* case, or to urge (Petition, p. 7) that "because of the large alien population residing in the Second Circuit," the decision in the respond-

ent's case has opened the door to the admission of great numbers of undesirable citizens. On the contrary, that decision has prevented closing the door in the face of so desirable a citizen as this respondent.

This is an exceptional case, turns upon its own peculiar facts, and has no relation to the "large alien population residing in the Second Circuit." The respondent, with commendable frankness, took great pains to set forth to the Naturalization Examiner and to the District Court his views as to the religious duty of a law-abiding Christian clergyman when confronted with a hypothetical conflict between his conscience and the demands of the State. We believe that any conscientious Christian, when confronted with the same problem, would give the same answer. The respondent's only fault (if it can be called such) is to be found in his scrupulous anxiety to make his position clear in advance, and in his desire to avoid even the shadow of equivocation or mental reservation in taking the oath. If he has been guilty of any offence, it is the offence of openly expressing his convictions where others, less discriminating and less sincere, would have remained silent. To deny him citizenship would serve only to place a premium upon intellectual dishonesty.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals was correct, and that the case is not one calling for the exercise by this Court of its supervisory power. The writ of certiorari should be denied.

Respectfully submitted,

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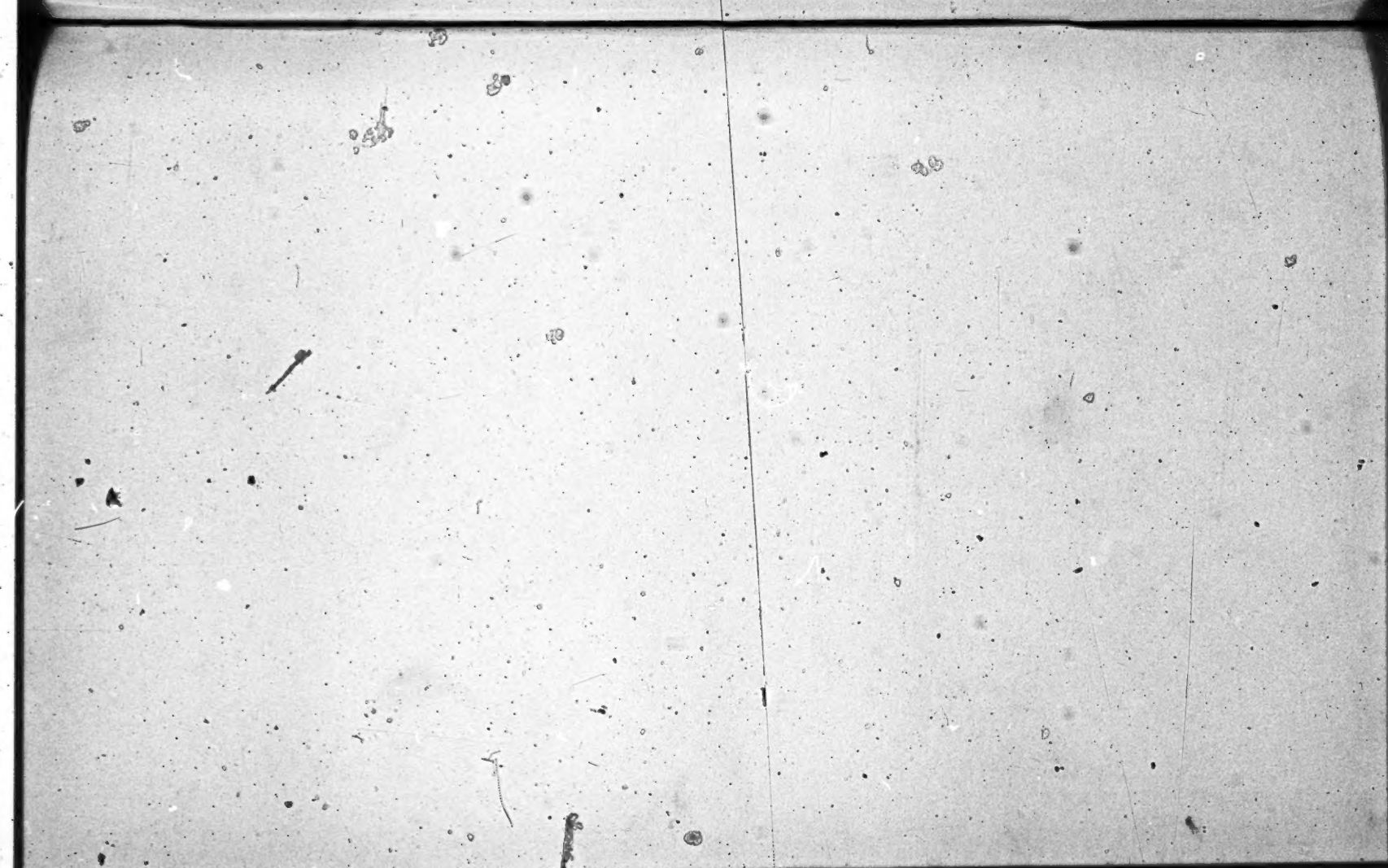

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 504.

THE UNITED STATES OF AMERICA,
Petitioner,

against

DOUGLAS CLYDE MACINTOSH,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

JOHN W. DAVIS,
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ALLEN WARDWELL,
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1930.

THE UNITED STATES OF AMERICA,
Petitioner,

against

DOUGLAS CLYDE MACINTOSH,
Respondent.

No. 504.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Opinion Below.

The District Court filed no opinion; but did, however, enter a final decree stating therein its reasons for denying the application of the respondent for citizenship (R. 16). The opinion of the Circuit Court of Appeals (R. 20-25) is reported in 42 F. (2d) 845.

Jurisdiction.

The judgment sought to be reviewed was entered on July 7, 1930 (R. 26). On October 7, 1930, the petitioner filed a petition for writ of certiorari which was granted by this Court on November 24, 1930 (R. 26).

Question Presented.

This is a proceeding for naturalization. Respondent, a Canadian citizen, was denied citizenship by the United States District Court for the District of Connecticut. The sole ground for questioning his right to be admitted is thus set forth in the decree of the District Court (R. 16):

> "It appearing that the said Petitioner, considering his allegiance to be first to the will of God, would not promise in advance to bear arms in defense of the United States under all circumstances but only if he believed the war to be morally justified, it is
>
> DECREED, that the Petitioner is not attached to the principles of the Constitution of the United States and further decreed that said petition for citizenship is denied."

The Circuit Court of Appeals reversed this decree and directed that the respondent be admitted to citizenship. It held that there is no fixed principle of the Constitution which requires a citizen with conscientious religious scruples to bear arms in time of war and that a refusal to perform military service on account of religious scruples is not inconsistent with the duties and obligations of citizenship. The sole question presented to this Court is whether the respondent's refusal to make the blanket promise demanded by the District Court requires the denial of his application.

Statute Involved.

The Naturalization Act of June 29, 1906 (34 Stat. 596; U. S. C., Title 8, Section 372, *et seq.*), contains these pertinent provisions:

> "Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:
>
> * * * * * * *
>
> Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the

Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

* * * * * * *

SEC. 7. That no person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States."

Statement of the Case.

The respondent, born on February 18, 1877, at Breadalbane, Ontario, Canada, first entered the United States in 1904 to become a graduate student at the University of Chicago (R. 1 and 9). While in this country in 1907, he was ordained as a Baptist minister (R. 9). After returning to Canada for two years, in 1909 he came to teach at Yale University, where he is now a member of the Faculty of the Divinity School, Chaplain of the Yale Graduate School and Dwight Professor of Theology (R. 10). Soon after the outbreak of the World War the respondent offered his services to the Canadian Minister of Militia. In the spring of 1916 he voluntarily enlisted as a chaplain in the Canadian Army and went overseas, where he saw service at the front in the neighborhood of Vimy Ridge and in the battle of the Somme (R. 10). He returned to America late in the year 1916, and during the succeeding year made many public addresses in support of the Western Allies[1] (R. 10). Joining the American Y. M. C. A., he again went to France in the spring of 1918, where he had charge of a Y. M. C. A. hut in the St. Mihiel region until the Armistice was declared (R. 10). He then resumed his duties at Yale University.

On February 18, 1925, the respondent filed in the District Court of the United States at New Haven, Connecticut, a declaration of his intention to become a citizen (R. 1). On

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[1] During the year, 1918, the respondent published a booklet, entitled "God in a World at War" (London: George Allen & Unwin, Ltd., 40 Museum Street, W. C. 1). In this book he wrote:

> "Ultimately, we may be sure, right must prevail, for wrong is not the sort of thing that can permanently succeed; it contains within itself the germs of its own ultimate destruction. But nothing in history can be surer than that this ultimate judgment upon evil does not necessarily involve the defeat of all unjustified military undertakings. The side with the greater moral justification has not always won its battles, nor even its wars. It is not enough to have justice on our side; we must use our might on the side of right. Right has to be worked for, and sometimes it has to be fought for. That is the kind of world that—not unfortunately for our development, probably—we are living in. And the fighting is no sham battle. Its issue is not predetermined. It is being decided while the fighting is going on" (p. 19).

March 18, 1929, he filed in the same Court a preliminary form for petition for naturalization accompanied by the certificate of arrival issued by the Department of Labor (R. 2), and a petition for naturalization accompanied by the proper affidavits of witnesses (R. 7). In the preliminary form for petition for naturalization he signified his willingness to take the usual oath to support and defend the Constitution of the United States; but in answer to question 22 of that form, asking him whether he was willing to take up arms in defense of this country, he stated: "Yes, but I should want to be free to judge of the necessity" (R. 5).

On June 10, 1929, the respondent was given a preliminary hearing before the naturalization examiner. At this hearing he submitted a memorandum explaining more fully his answers to certain questions in the preliminary form, including his answer to question 22, above quoted (R. 8). In it he stated:

> "I do not undertake to support 'my country right, or wrong' in any dispute which may arise, and I am *not* willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not 'take up arms in defense of this country,' however 'necessary' the war may seem to be to the government of the day. It is only in a sense consistent with these statements that I am willing to promise to 'support and defend' the Government of the United States 'against all enemies, foreign and domestic.'" (R. 8).

As a consequence the naturalization examiner recommended that the petition be denied, giving as his reason "attachment to the principles of the Constitution not shown" (R. 15).

On June 24, 1929 he appeared before the Judge of the District Court. Since there was no stenographic record of the proceedings, counsel for the Government and for the respondent prepared a statement of facts substantially as presented to the Court at that hearing. The statement was subsequently approved by the District Court and constitutes part of the record of the case (R. 9). The respondent submitted

to the Court a memorandum summarizing his war record (R. 8) and an excerpt from "Who's Who in America" (R. 9).

It was not until this final hearing before the District Court that the respondent explained his position in detail. There it appeared, in response to a question asked him by the Judge, that his attitude was based upon religious convictions (R. 12). Without equivocation he stated to the Judge:

> "* * * that he was ready to give to the United States, in return for citizenship, all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God. The applicant explained that if he were to be a citizen of the United States he would recognize special duties and obligations by virtue of that citizenship over and above his general duty to humanity as such. The applicant believed that the international outlook he advocated would not mean the doing away of nationalism" (R. 12).

The respondent was willing to take, and believed he could take, the oath of allegiance without any alteration or qualification (R. 5 and 12). He stated explicitly that he was not a pacifist, and that he believed in the use of armed force "in the exercise of police functions in national or international relations, and that there were circumstances under which such force could also be justifiably used, for instance, to repel invasion, or even to defend a weaker nation" (R. 14). He merely desired to explain to the Court that in some particular future war (that is, one which he believed to be unjust and contrary to Christian principles), he might have conscientious religious scruples against bearing arms; and that he could not therefore give a blanket promise in advance to bear arms in any and all wars in which this country might engage. In the words of the Circuit Court of Appeals, he "wishes to keep pure his religious scruples" (R. 25).

This attitude of the respondent, the District Court believed, compelled it to deny the petition for naturalization (R. 16). The Circuit Court of Appeals took the opposite view.

Summary of Argument.

I. The sole issue in this case is one of law, namely, whether the respondent, in order to satisfy the requirements of the Naturalization Act, must promise in advance to bear arms in any and all future wars, even against his conscientious religious scruples. Congress has not demanded such a promise.

II. The Constitution and laws of the United States do not require that citizens with conscientious religious scruples bear arms.

III. A promise to forego a privilege enjoyed by a native born citizen under the Constitution and laws of the United States cannot be exacted of an alien as a condition of his naturalization.

IV. The decision of the Circuit Court of Appeals accords with that of this Court in *United States* v. *Schwimmer*, 279 U. S. 644.

POINT I.

The sole issue in this case is one of law, namely, whether the respondent, in order to satisfy the requirements of the Naturalization Act, must promise in advance to bear arms in any and all future wars, even against his conscientious religious scruples. Congress has not demanded such a promise.

Congress has provided in the Naturalization Act of 1906 that an applicant for naturalization must declare on oath in open court that "he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same" (U. S. C., Title 8, Sec. 381) and that "it shall be made to appear to the satisfaction of the court admitting any alien to citizenship * * * that during that time [five years] he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same" (U. S. C., Title 8, Sec. 382).

Furthermore, Congress has at various other times specifically legislated on the admissibility of certain aliens. It has declared the exclusion of Chinese, persons who disbelieve in or who are opposed to organized government, polygamists, aliens who cannot speak the English language and subjects of neutral countries who during the World War withdrew their intention to become citizens of the United States (U. S. C., Title 8, Secs. 363-366). But at no time has Congress provided that aliens with conscientious religious scruples against bearing arms must be excluded. Nor can it be inferred, as the Government contends (Br., p. 21), from the Act of July 9, 1918, debarring from citizenship subjects of neutral countries who withdrew their intention of becoming naturalized in order to be relieved from military service, that Congress

meant to exclude persons with conscientious religious scruples. In addition, under that Act there would have been no need for any such subject with conscientious religious scruples to withdraw his declaration of intention for he would have been protected by the general provision of Section 4 of the Selective Service Law (*infra*, p. 27), exempting him from combatant service. Hence, statutory provision for the exclusion of the respondent must be found, if at all, in the general requirements which Congress laid down in the Act of 1906.

Although the District Court in denying citizenship to the respondent based its decision solely on the non-attachment of the respondent to the principles of the Constitution, the Government now contends in its brief that the respondent failed in two respects to meet the general requirements of the Naturalization Act of 1906. In the first place, it is asserted the respondent refused to take the oath of allegiance without qualification or mental reservation; and secondly, failed to satisfy the District Court that he was and had been for at least five years attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same (Government's Br., p. 15).

With respect to the former of these contentions, the argument of the Government in its naked outline is this. The Naturalization Act requires each applicant for citizenship to declare on oath his readiness to support and defend the Constitution and laws of the United States. The respondent refused to take this oath without qualification and without reserving to himself the right to determine whether he would bear arms in some future war. An oath, it is stated, must be taken without qualification or mental reservations, for with them, the sanction embraced in an oath is gone (Government's Br., p. 15). Consequently, the respondent failed to meet the provisions of the Act. This reasoning of the Government is simple but nevertheless fallacious.

The record of this case discloses that the respondent did not refuse to take the oath of allegiance in the terms prescribed

by the Naturalization Act and the Naturalization Regulations of the Department of Labor. Unlike the applicant in *In Re Clarke*, 301 Pa. St. 321, 152 Atl. 92, the respondent did not ask to alter the form of the oath nor did he think it necessary. In the preliminary form for petition for naturalization he answered in the affirmative and without qualification question 20, which asks an applicant whether he is willing to take the oath in becoming a citizen (R. 5). Moreover, the memorandum submitted by the respondent to the District Court (R. 8) contains no indication of a refusal to take the oath of allegiance in its present form. An examination of this memorandum discloses that its real and sole purpose was the clarification of the views of the respondent on the bearing of arms. At the hearing before the District Court the respondent again stated that he would take the oath of allegiance *without alteration* (R. 12). It should be noted that the naturalization examiner who had before him the memorandum submitted by the respondent did not recommend that the application for citizenship be denied because of any refusal or inability on the part of the respondent to take the required oath of allegiance. Likewise, the District Court in its final decree denying citizenship to the respondent did not base its decision upon a refusal to take the oath of allegiance.

But since the respondent did not request any verbal alteration or qualification of the oath of allegiance, obviously the only method by which he can be said to have qualified the oath or to have entertained a mental reservation with respect thereto was by his statement that he could not promise in advance to bear arms in an unjust war against his conscientious religious scruples. An oath is not taken with qualification or a mental reservation unless the attitude, beliefs and views of the person about to take the oath are *inconsistent* with the oath. If it were not so, any expression of thought, whatever it might be, would be a qualification or a mental reservation, according to the argument of the Government. Under such circumstances no thinking person could take an oath. For instance, the Govern-

ment would scarcely urge that a person who believes that our present Constitution should be modified in certain respects[1], or who states explicitly that he will insist upon the exercise of religious freedom or the enjoyment of freedom of speech guaranteed him by the Constitution and the laws of the United States is incompetent to take the oath of allegiance because in result he would be qualifying the oath and making mental reservations. It is not sufficient for the Government to show that the respondent was a discriminating and intelligent person who desired to clarify his views as to the bearing of arms; the Government must prove that the expression of such views by the respondent is *inconsistent* with the allegiance owed by a citizen of the United States. Accordingly, if the Constitution and laws of the United States do not in fact demand a promise to bear arms against conscientious religious scruples, there is no qualification of or mental reservation to the oath of allegiance.

The oath of allegiance which an applicant for citizenship is required to take, we submit, does not demand that the applicant give to the Government a *carte blanche* promise to bear arms even against his conscientious religious scruples.

The Naturalization Act of 1906 merely requires that an alien shall before he is admitted to citizenship

> "declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all the allegiance and fidelity to any foreign prince, potentate, state or sovereign and particularly by name to the prince, potentate, state or sovereign of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States, against all enemies, foreign and domestic, and bear true faith and allegiance to the same" (U. S. C., Title 8, Sec. 381).

Pursuant to the power vested in it by the Naturalization Act, the Department of Labor has promulgated rules and

[1] See *United States* v. *Rovin*, 12 F. (2d), 942 (E. D. Mich. 1926).

regulations in which the definite form of oath to be taken by an applicant is prescribed (Naturalization Rules and Regulations of July 1, 1929, Rule 8, Subdivision C, par. 1). This oath reads as follows:

> "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, State or sovereignty, and particularly to ————————, of whom (which) I have heretofore been a subject (citizen); that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: *So help me God.* In acknowledgment whereof I have hereunto affixed my signature." (Italics added.)

The general statutory provision, of course, "that a requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form" is applicable to the Naturalization Act (R. S. Sec. 1; U. S. C. Title 1, Sec. 1). This provision was enacted principally for the benefit of Quakers, most of whom it is known entertain scruples against bearing arms. It would therefore be incongruous to imply that Congress meant that in making such affirmation they were required to undertake to bear arms despite their religious scruples.

It, moreover, appears that the provisions in the Naturalization Act requiring an applicant to take the oath and to prove that he is attached to the principles of the Constitution are interdependent. If refusal to bear arms against religious scruples does not show a lack of attachment to the principles of the Constitution, presumably it does not disqualify an alien from taking the oath of allegiance to the country. In other words, the duty exacted by one is not more extensive than that exacted by the other.

The oath of allegiance is practically identical with the oath of office which all public officials of the United States, except the President, have been required to take since May

13, 1884[2] (23 Stat. 22; U. S. C. Title 5, Sec. 16). This oath of office is administered pursuant to the provision of Article VI of the Constitution of the United States, which reads as follows:

> "The senators and representatives before mentioned, and the members of the several State Legislatures and all executive and judicial Officers, both of the United States, and of the several States, shall be bound by Oath or Affirmation to support this Constitution; but no religious Test shall ever be required as a Qualification to any office or public Trust under the United States."

And by Section 1 of Article II of the Constitution it is provided that,

> "Before he [the President] enter upon the execution of his office, he shall take the following oath or affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States'."

We shall not undertake to review the development of the oath of allegiance or of the oath of office. Suffice it to state that it is historically well known that the oath has never been so construed as to preclude a person with conscientious religious scruples against bearing arms from honestly and legally swearing thereto.[3] It is significant that Article VI of the Constitution permits an affirmation as well as an oath and specifically states that no religious test shall ever be

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[2] The oath of office as made applicable by the Act of May 13, 1884, reads as follows: "I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." (R. S. Sec. 1757; U. S. C. Title 5, Sec. 16.)

[3] For instance, in the Cabinet of President Lincoln there sat Edward Bates as Attorney General, Salmon P. Chase as Secretary of the Treasury and Edwin M. Stanton as Secretary of War, all members of the Society of Friends.

required as a qualification to any office or public trust. Here is another indication of the zeal of the founders of this country to assure to all freedom of conscience and of religion. To prevent a person taking the oath of office on account of his conscientious religious scruples against bearing arms would manifestly violate this constitutional prohibition. Moreover, it has never been suggested that the oath prescribed by the Constitution for the President (who is *ex officio* Commander in Chief of our armed forces) could not be taken by a person, such as a Quaker, possessing conscientious scruples against the bearing of arms.

We submit, therefore, that since a person with conscientious religious scruples against bearing arms is not precluded from taking either the oath of office or the oath of allegiance, it is idle to contend that the respondent in entertaining such scruples "refused to take the oath without qualification or mental reservation" and that consequently he should be denied citizenship. Upon analysis the magical formula proposed by the Government discloses its utter superficiality.

The Government also asserts in its brief that the respondent failed to meet the requirement that he was and had been for five years "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same" (Government's Br., p. 15). This, in fact, was the sole reason assigned by the District Court for its denial of respondent's petition (R. 16). The Circuit Court of Appeals, however, held that there is no fixed principle of the Constitution of this country requiring a citizen with conscientious or religious scruples against bearing arms, nevertheless to bear arms in time of war (R. 23). Here is the crux of the case.

That attachment to the principles of the Constitution includes, in a proper case, an expression of willingness to defend the Government by force of arms is undisputed. *Selective Draft Cases*, 245 U. S. 366. And for that reason, as stated by this Court in *United States* v. *Schwimmer*, 279 U. S. 644, an examiner or a court is permitted to inquire into the views

of an applicant on the bearing of arms. As naturalization is at present administered, this inquiry is made mainly by question 22 of the preliminary form for petition for naturalization (R. 5). Incidentally, this question emanates from no statute but was only recently introduced in the petition by the Secretary of Labor. Although this Court in the *Schwimmer* case apparently approved its insertion, we nevertheless emphasize that that question is merely informative as to whether an applicant is attached to the principles of the Constitution. It has no other purpose. In order to be entitled to naturalization, the respondent is not required by any provision of law to give to that question an unqualified and categorical affirmative answer.

As the Circuit Court of Appeals said (R. 23):

> "An inquiry as to whether he will willingly bear arms is a proper inquiry to ascertain where the applicant stands in the test thus laid down by the naturalization law, but it does not follow because the applicant did not answer question No. 22 categorically but qualified his answer by the statements referred to, that he has not complied with the requirements of the naturalization law entitling him to admission. Question 22 is merely informative and necessarily directed to determine whether the applicant is attached to the principles of the Constitution and laws of the United States. It will, of course, be recognized as a duty of the citizen to bear arms in defense of his country, but there is also the well recognized qualification that a person does not lack nationalism or affection for his government if, by reason of a conscientious religious scruple, he requests being excused from bearing arms."

The Government in its brief attempts at this stage to prove that the respondent does not possess conscientious religious scruples against bearing arms. For instance, on page 10 of its brief it argues that "the assumption in the opinion of the court below that the respondent refused to bear arms in defense of this country because of conscientious or religious scruples is hardly justified by the record". While the

respondent in his answers to questions 20, 21 and 22 of the preliminary form for petition for naturalization did not indicate that the cornerstone of his position was religious belief, nevertheless it indisputably appears from the testimony offered by the respondent at the final hearing before the District Court that he was prevented from making a blanket promise to bear arms in any and every future war only because in some particular future war he might have conscientious religious scruples against bearing arms. The rock-bottom of the respondent's attitude is found in his statement that "his first allegiance was to the will of God, defined as what was morally right and for the ultimate well-being of humanity, and that after that he would put allegiance to one's country as coming before all merely individual and private interest" (R. 12). The assertion by the Government in its brief that the respondent "insists upon the reserved right to determine that matter [bearing arms] for himself" (Government's Br., p. 10) is a misleading half truth. On its face it appears that the respondent reserves to himself the right not to bear arms, but in fact—and this is fundamental—his decision not to do so is dictated solely and directly by what he considers to be the will of God speaking through his conscience. The respondent is not seeking to transfer from Congress to himself the right to determine whether the defense of this country requires him to bear arms, as contended by the Government; rather the respondent is anxious to protect himself against the necessity of violating his allegiance to God, which he considers to come before allegiance to any country. Finally, it may be noted that the District Court, whose function it was to find the facts, definitely stated in its final decree that the position of the respondent impinged upon conscientious religious scruples (R. 16). We submit, therefore, that any attempt by the Government to assert that the respondent does not act from religious scruples is unjustified by the facts.

The Government also asserts in its brief that the respondent has no conscientious or religious views that set

him apart from every other applicant for citizenship, and that the granting of the right he claims would seem to require that such right be accorded every other qualified applicant (Government's Br., p. 11). This statement is presumably made by the Government because the respondent does not belong to a religious sect whose definite and crystallized doctrine forbids its members bearing arms under any circumstances. Such a view evidences a failure to understand religion in its true sense. In *Davis* v. *Beason*, 133 U. S. 333, 342, this Court definitely distinguished religion from cultus:

> "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter."

We submit that the principle enunciated by the Circuit Court of Appeals on this matter is the proper one, namely, that "a citizen sharing views which amount to conscientious or religious scruples against bearing arms in what he regards as an unjustified war is akin to one having conscientious scruples against all wars" (R. 24). After all, membership in a sect known to forbid the bearing of arms merely simplifies proof of the sincerity of a person's scruples. Logically and practically no differentiation on the basis of membership in a sect should be made between persons who honestly possess conscientious religious scruples. A person either has such scruples or he has not. The courts have adopted this attitude in applying exemptions to persons with conscientious religious scruples. *Dole* v. *Allen*, 4 Me. 527, and *Lees* v. *Childs*, 17 Mass. 351. The Government also took this position in administering Section 4 of the Selective Service Law.[4]

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[4] See Statement Concerning the Treatment of Conscientious Objectors in the Army, prepared by the Secretary of War, June 18, 1919, pages 17-18, 29, and Second Report of the Provost Marshal General on Selective Service System, December 20, 1918, pages 58-59.

Moreover, it should be pointed out that there is a current misconception as to the belief of Quakers.[5] In general it is thought that all Quakers are constrained by the dogma or doctrine of their sect never to bear arms. Yet in the Book of Discipline of Quakers there is found no tenet forbidding a member from bearing arms. In short, it appears that the Quaker belief adopts no fixed and binding statement of faith, because God is continually disclosing to men fresh revelations of his truth as they are able to receive it. For instance, during the Civil War many members of the Society of Friends, such as Colonel Norman Penrose Hallowell, who succeeded to the command of Shaw's Regiment, engaged in combatant service. The position of the respondent is indeed identical with that of a Quaker who possesses conscientious religious scruples against bearing arms.

It is manifestly unsound for the Government to contend that the respondent possesses no conscientious religious views which set him apart from every other applicant (Government's Br., p. 11). Not all applicants are motivated strictly and rigidly by a conscience dictated by the will of God and many of those who claim to be are in fact differently motivated.[6] For that reason we submit that it is fallacious for the Government to draw the sweeping and alarming conclusion that if the respondent were admitted to citizenship, "the Constitutional power of Congress to declare war and raise and support armies would become impotent" (Government's Br.,

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[5] See, for example, Constitution and Discipline of the Five Years Meeting of Friends in America (1930) (Nicholson Printing Company of Richmond, Indiana); The Book of Discipline of the Religious Society of Friends, Adopted by Philadelphia Yearly Meeting (1927); and Margaret E. Hirst, The Quakers in Peace and War (The Swarthmore Press, Ltd., Ruskin House, 40 Museum St., W.C. 1, London; George H. Doran Co. of New York City (1923)).

[6] "As a matter of fact, the ratio of men professing conscientious objections [religious or otherwise] in the camps to the total inductions is as 3,989 to 2,810,296 or 0.0014 per cent." (Statement Concerning the Treatment of Conscientious Objectors in the Army, prepared by Secretary of War, on June 18, 1919, at page 9.)

p. 11). The very exaggeration of the statement robs it of all force.

The Government in several places in its argument beckons to its aid the principle stated by this Court in the *Schpimmer* case, that if doubt remains in the mind of a court as to any essential matter of fact the United States is entitled to the benefit of such doubt and the application for citizenship should be denied. But on the record before this Court there is no reason to entertain doubt as to "any essential matter of fact". The question here, moreover, is not whether sufficient evidence was presented to persuade the District Court that the respondent satisfied the requirements of the Naturalization Act. In fact, the District Court, as conclusively shown by its final decree, based its denial of citizenship purely upon a clear issue of law. And in such a case it is novel for the Government to contend that the Circuit Court of Appeals and this Court are foreclosed from passing judgment upon the legal conclusions of the District Court. We are, consequently, at a loss to understand the assertion that the "ultimate responsibility of deciding" whether the respondent met the requirements of the Act rests with the District Court (Government's Br., p. 10).

In conclusion, therefore, the sole issue in this case is one of law, namely, whether the respondent in order to satisfy the requirements of the Naturalization Act must promise in advance to bear arms in any and all future wars even against his conscientious religious scruples. Congress has not so provided. Although Congress has expressly legislated that an applicant for citizenship cannot believe in anarchy or polygamy, it has never declared that an applicant must not entertain conscientious religious scruples against bearing arms. Nor can it be argued that Congress intended such a prohibition by the use of the general and indefinite provisions of the Naturalization Act, which we have already discussed. As stated by this Court in *Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457, 465, "no purpose of action against relig-

ion can be imputed to any legislation, state or national, because this is a religious people."[7] For this Court, therefore, to inject such language into the Act would be not only to ignore the constant purpose of Congress, so often evidenced, to respect the religious scruples of the citizen, but to legislate where Congress has been silent.

POINT II.

The Constitution and laws of the United States do not require that citizens with conscientious religious scruples bear arms.

A careful study of statutes and constitutions from the earliest Colonial times to the present discloses that it has been the fixed policy of the United States and of the several States to exempt citizens having religious scruples from the duty of bearing arms in violation of those scruples. The authorities upon this point were fully collated in our brief before the Circuit Court of Appeals, and some of them have been cited in the opinion of that Court (R. 23).

The militia acts of the Colonies and the statutes of the thirteen original States enacted prior to the adoption of the

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[7] Chancellor Kent of New York stated that, "The people of this state in common with the people of this country, profess the general doctrine of Christianity as a rule of their faith and practice". *People* v. *Ruggles*, 8 Johns. 291 (N. Y. 1811). Following a dictum of Lord Coke that "Christianity is part and parcel of the Common Law," many courts in the United States have held that Christianity is likewise part and parcel of the Common Law of the United States.

Vidal v. Girard's Executors, 2 How. 127, 199; Shover v. State, 10 Ark. 259 (1850); State v. Chandler, 2 Har. 553 (Del. 1837); State v. Bott, 31 La. Ann. 562 (1879), 33 Am. Rep. 224; Pearce v. Atwood, 13 Mass. 324 (1816); Lindenmuller v. People, 33 Barb. 548 (N. Y. 1861); Updegraph v. Comm., 11 S. & R. 394 (Pa. 1824); Charleston v. Benjamin, 2 Strob. 508 (S. C. 1846), 49 Am. Dec. 608; Bell v. State, 1 Swan. 42 (Tenn. 1851); Grimes v. Harmon, 35 Ind. 198 (1871); Melvin v. Easley, 52 N. C. 386 (1860); Judefind v. State, 78 Md. 510, 28 Atl. 405 (1894).

See also *Brewer*, The United States a Christian Nation (1905).

Constitution[8] generally allowed a citizen to obtain a substitute or to pay a special tax in lieu of rendering personal service, thereby obviating the necessity of special provisions with respect to citizens having religious scruples. In addition, however, the Colonial legislation of New Hampshire, New York, North Carolina, Massachusetts and Virginia specifically exempted Quakers and members of other religious sects having scruples against bearing arms (N. H., 4 Metcalf 273, 274; N. Y., 3 Colonial Laws 1068-1069; N. C., 24 State Records 193, 361; Mass., 4 Acts and Resolves 159, 193; Virginia, 5 Hening 16).[9] Similarly the Draft Acts enacted by the original States to recruit the Continental Army usually provided that a person could either find a substitute or pay a reasonable sum or tax.[10] Furthermore, some of those Acts dealt specifically with persons having scruples. See Appendix A at page 52, *infra*. Several of the State constitutions enacted previous to the adoption of the Federal Constitution granted to such citizens the privilege of not bearing arms. See the Constitutions of New Hampshire of 1784,

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[8] These acts and statutes are collated in Appendix A, at pages 129-130, of the Brief of the United States in the *Selective Draft Cases*, October Term, 1917, No. 656.

[9] See also Appendix A, at page 52, *infra*.

[10] The Draft Acts to recruit the Continental Army are listed in Appendix B, at pages 131-132, of the Brief for the United States in the *Selective Draft Cases*, October Term, 1917, No. 656.

For instance, the Draft Act of New Hampshire (Act of January 13, 1777, Laws, Metcalf's Ed. Vol. 4, p. 77) provides:

> "And be it further enacted by the Authority aforesaid, that when and so often as any person or persons drafted to serve as aforesaid shall refuse or neglect to make a reasonable excuse to the acceptance of the person or persons by whom he is so drafted or to pay into their hands the sum of Ten pounds—he shall be held and taken to be a soldier in the service for which he was so drafted. And if any soldier neglect or refuse to march when ordered thereto according to the mode prescribed in the before-recited Act unless he produces a discharge from or provides some able-bodied man in his stead to the acceptance of the persons herein impowered to draft him, he shall forfeit and pay into the hands of such persons the sum of twelve pounds in default of which payment the same shall be recovered on Complaint * * *"

Vermont of 1777, New York of 1777 and Pennsylvania of 1776.[11]

It was with the knowledge of the treatment that the Colonies and the original States, not only by their legislation but also by their constitutions, had accorded to persons with conscientious religious scruples, that the delegates to the Constitutional Convention granted to Congress by Article I, Section 8, of the Constitution, the power to raise and support armies. While the Constitutional debates show that an unsuccessful attempt was made to limit the size of the Federal army in time of peace (Elliot, Debates, Vol. 5, p. 443), and that an amendment was added to the draft of the Constitution submitted by the Committee on Detail to the effect that

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[11] In the Constitution of New Hampshire of 1784, it is provided:

"No person who is conscientiously scrupulous about the lawfulness of bearings arms, shall be compelled thereto, provided he will pay an equivalent" (Thorpe, Constitutions, Charters and Organic Laws, Vol. 4, p. 2455).

The Constitution of the State of Vermont of 1777 provides in Chapter I, entitled "A Declaration of the Rights of the Inhabitants of the State of Vermont":

"III. That all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding, regulated by the word of God; and that no man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience; nor can any man who professes the protestant religion, be justly deprived or abridged of any civil right, as a citizen, on account of his religious sentiment, or peculiar mode of religious worship, and *that no authority can, or ought to be vested in, or assumed by, any power whatsoever, that shall, in any case, interfere with, or in any manner controul, the rights of conscience, in the free exercise of religious worship:* nevertheless, every sect or denomination of people ought to observe the Sabbath, or the Lord's day, and keep up, and support, some sort of religious worship, which to them shall seem most agreeable to the revealed will of God." (Thorpe, *ibid.*, Vol. 6, p. 3740.) (Italics added.)

"IX. * * * nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent; * * *" (*ibid.*, p. 3741).

These provisions were retained in the Constitution of Vermont of 1786 (*ibid.*, pp. 3752 and 3753), and in fact form part of the existing Constitution of 1793 (*ibid.*, pp. 3762 and 3763).

The Constitutions of New York of 1777 (Thorpe, *ibid.*, Vol. 5, p. 2637) and of Pennsylvania of 1776 (Thorpe, *ibid.*, Vol. 5, p. 3083) also expressly granted to a citizen having conscientious religious scruples the privilege of not bearing arms.

no appropriation for such purpose should be made for a term longer than two years (Elliot, Debates, Vol. 5, pp. 510-11), the debates contain no discussion of the power of the Federal Government even to compel military service in general. It is, therefore, natural that the records should be silent as to the privilege of a citizen religiously scrupulous of bearing arms. Moreover, it was doubted, to say the least, by many members of the Constitutional Convention at the time of the adoption of the Constitution that Congress had been granted the general power to compel military service from its citizens.

Ratifications of the Constitution, however, by the original States, clearly show that it was considered a privilege under

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It is of some interest that the Fundamental Constitution for the Province of East New Jersey of the year 1683 contained this provision:

"Forasmuch as by the Concessions and agreements of the former Proprietors, (to wit) the Lord Berkeley and Sir George Carteret, to and with all and every the adventurers and all such as shall settle and plant in the Province in Anno 1664, it is consented and agreed by the six and seven articles, that the great Assembly should have power, by act confirmed as there expressed, to erect, raise and build within the said Province, or any part thereof, such and so many forts, castles, cities and other places of defence, and the same, or any of them, to fortify and furnish with such provisions and proportions of ordnance, powder, shot, armour and all other weapons, ammunition and abilments of war, both offensive and defensive, as shall be thought necessary and convenient for the safety and welfare of the said Province; as also to constitute train bands and companies, with the number of the soldiers, for the safety, strength and defence of the aforesaid Province; to suppress all mutinies and rebellions; to make war offensive and defensive, against all and every one that shall infest the said Province, not only to keep the enemy out of their limits, but also, in case of necessity, the enemy by sea and land to pursue out of the limits and jurisdiction of the said Province. *And that amongst the present Proprietors there are several that declare, that they have no freedom to defend themselves with arms, and others who judge it their duty to defend themselves, wives and children, with arms; it is therefore agreed and consented to, and they the said Proprietors do by these presents agree and consent, that they will not in this case force each other against their respective judgments and consciences; in order whereunto it is Resolved, that on the one side, no man that declares he cannot for conscience sake bear arms, whether Proprietor or planter, shall be at any time put upon so doing in his own person, nor yet upon sending any to serve in his stead.* And on the other side, those who do judge it their duty to bear arms for the publick defence, shall have their liberty to do in a legal way." (Thorpe, Constitutions, Charters and Organic Laws, Vol. 5, pp. 2576-77.) (Italics added.)

our form of government that such a citizen should not be forced to bear arms.[12] In response to the urgent demand of the States that the more fundamental rights of the people should be expressly protected by the Constitution, James Madison, on June 8, 1789, presented to the House a list of amendments including the provision that "no person religiously scrupulous of bearing arms shall be compelled to ren-

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[12] The States of Virginia and North Carolina, for instance, suggested in their resolutions of ratification,

"That there be a declaration or bill of rights asserting, and securing from encroachment, the essential and unalienable rights of the people, in some such manner as the following:—

FIRST. That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety. * * *

NINETEENTH. *That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.*

TWENTIETH. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore *all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience*, and that no particular religious sect or society ought to be favored or established by law in preference to others" (Virginia, Journals of Congress, Vol. 13, pp. 174-176; Elliot, Debates, Vol. 3, pp. 657-659; North Carolina, Journals of Congress, Vol. 13, pp. 185-187; Elliot, Debates, Vol. 4, pp. 243-244). (Italics added.)

The delegates of the State of Rhode Island in ratifying the Constitution declared:

"That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force and violence; and therefore all men have a natural, equal, and unalienable right to the exercise of religion according to the dictates of conscience; and that no particular religious sect or society ought to be favored or established, by law, in preference to others. * * *

"That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead." (Elliot, Debates, Vol. 1, pp. 334-335.)

The State of New Hampshire suggested in its resolution of ratification, in order to "remove the fears and quiet the apprehensions of many of the good people of this state", that the Constitution should expressly provide that "Congress shall make no laws touching religion, or to infringe the rights of conscience" (Journals of Congress, Vol. 13, pp. 171, 172).

der military service in person"[12] (Annals of Congress (Gales), First Congress, Vol. 1, p. 434).

As a result of unavoidable compromise in language and of a desire for brevity, the suggestions that the Constitution should expressly protect the "unalienable right to the free exercise of religion, according to the dictates of conscience", "the rights of conscience" and the rights of a "person religiously scrupulous of bearing arms" were merged and incor-

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[12] The amendments proposed by James Madison read in part as follows:

"Fourthly. That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, *nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.* * * *

The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; *but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.*" (Annals of Congress (Gales), First Congress, Vol. 1, p. 434). (Italics added.)

The protection of the rights of conscience was paramount in the mind of the advocate of the first ten amendments to our Constitution; in one of the debates he stated:

"Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body [House of Commons], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution" (Annals of Congress (Gales), First Congress, Vol. 1, p. 436).

In this connection it is interesting to note also the following excerpts from the debates of the First Congress:

"The fourth propostion being under consideration, as follows:

Article 1. Section 9. Between paragraphs two and three insert 'no religion shall be established by law, nor shall the equal rights of conscience be infringed' (*ibid.*, p. 729). * * *

Mr. Livermore was not satisfied with that amendment; * * *. He thought it would be better if it were altered, and made to read in this manner, that Congress shall make no laws touching religion, or infringing the rights of conscience. * * * the question was then taken on Mr. Livermore's motion, and passed in the affirmative, thirty-one for, and twenty against it" (*ibid.*, p. 781).

porated in Article I of the Bill of Rights. Furthermore, it should not be forgotten that Article IX expressly provided that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people". The Supreme Judicial Court of New Hampshire in *Hale* v. *Everett*, 53 N. H. 9, 60-61; 16 Am. Rep. 82, 99-100, held the rights of conscience to be inalienable (*infra*, p. 38). See also Story, Constitution, Vol. 2, section 1876 (*infra*, p. 37).

A review of the legislation and Congressional debates in regard to the raising of a militia and the conscription of soldiers further proves that the Constitution and laws of the United States have always recognized that persons having religious scruples against bearing arms need not do so. In fact, this recognition was granted in the earliest legislative proposals for a national militia. We have discussed these in Appendix B, at page 56, *infra*. Religious scruples were also safeguarded by Congress in the Act of March 3, 1863,[14] the Acts of February 24, 1864,[15] the Act of January 21, 1903,[16] the Act of June 3, 1916,[17] and the Selective Service Law of May 18, 1917.[18] The same principle has been recognized time and again by the constitutions and statutes of the several States. The pertinent provisions of the State constitutions have been given verbatim in Appendix C, at page 60, *infra*, and the State militia statutes have been listed in Appendix D, at page 68, *infra*. See also the opinion of the Circuit Court of Appeals (R. 23). At the present time, so far as we have been able to discover, in all of the States except Arizona, Indiana, Missouri, Vermont and Wisconsin, the statutes

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[14] While the Act of March 3, 1863 (12 Stat. 731), providing for enrolling and calling out the national forces contained no provision in regard to persons possessing religious scruples, the Act did permit any person called to service to furnish a substitute or pay the sum of three hundred dollars (§ 13).

[15] By the Act of February 24, 1864 (13 Stat. 6), persons with religious scruples were given, in addition to the right to furnish a substitute or pay three hundred dollars, the alternative of being assigned "to duty in hospitals, or to the care of freedmen" (§ 17).

either provide that all persons exempted by the laws of the United States (which grant a privilege to persons having conscientious religious scruples) are likewise exempted from service in the state militia, or else they declare specifically that persons having conscientious religious scruples shall not be compelled to bear arms. However, in all the five states except Wisconsin, a specific exemption of such persons is made in the state constitution. And in the State of Wisconsin there is no statute requiring compulsory militia service.

In conclusion, we submit that while our Constitution gives the Government the right to compel military service from its citizens (*Selective Draft Cases*, 245 U. S. 366), the Constitution and laws of the United States recognize that alongside this general principle exists an exception—a privilege that persons with conscientious religious scruples need not bear arms.

The decisions of this Court interpreting the First Amendment to the Constitution also support our contention. When Congress incorporated into this amendment the provision,

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[16] The Act of January 21, 1903 (32 Stat. 775), enacted to establish a national militia, definitely states that no person "whose religious convictions are against war or participation therein" shall be compelled to serve in the militia or any other armed force (§ 2).

[17] While the Act of June 3, 1916 (39 Stat. 197; U. S. C., Title 32, § 1), states that the militia of the United States shall consist of all able-bodied citizens from the age of eighteen to forty-five, it also provides that "all persons who because of religious belief shall claim exemption from military service, * * * shall be exempted from militia service in a combatant capacity" (§ 3). The Act nevertheless does demand non-combatant service from such persons.

[18] The Selective Draft Act of May 18, 1917 (40 Stat. 76; U. S. C., Title 50, p. 165), provides that a person "whose religious convictions are against war or participation therein" shall not be required or compelled to serve in any of the forces, but shall be subject to call to render service of a non-combatant nature (§ 4). In this connection, it may be noted that the British Military Service Act of January 27, 1916 (Statutes of England 5-6 George V, Ch. 104, § 2 (1) and § 2 (3); Congressional Record, 65th Congress, First Session, Vol. 55, Part 2, p. 1528), and the Canadian Military Service Act of August 29, 1917 (Statutes of Canada, 7-8 George V, Ch. 19, § 11 (1) (f); Congressional Record, 65th Congress, First Session, Vol. 55, Part 7, p. 7269), both provide that a person with conscientious religious scruples need not bear arms.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

and when the various States ratified the amendment, free exercise of religion had for the people a meaning moulded and consecrated by the country's history.[19] The phrase is not defined by the Constitution. The meaning of religion, as used in the Amendment, has been perhaps best stated by Mr. Justice Field of this Court in *Davis* v. *Beason, supra,* page 342:

> "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for His being and character, and of obedience to his will."

Moreover, this Court recognized in that case that free exercise of religion involves "man's relation to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on

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[19] In reference to the conditions prevailing in the Colonies, Chancellor Kent in his Commentaries states:

> "It appears from these illustrious examples, that various portions of this country became, even in its infant state, a distinguished asylum for the enjoyment of the principles of civil and religious liberty, by the persecuted votaries of those principles from every part of Europe" (Vol. 2, p. 37).

Practically at the beginning of the development of this country, the Charter of Rhode Island of 1663, inspired by its founder, Roger Williams, declared:

> "* * * that no persons within the colony, at any time hereafter, should be in any wise molested, punished, disquieted or called in question, for any differences in opinion in matters of religion, who do not actually disturb the civil peace of the colony" (Kent, Commentaries, Vol. 2, p. 35).

It is recalled, moreover, that Thomas Jefferson only two years before the meeting of the Constitutional Convention introduced in the Legislature of the State of Virginia his immortal act for the establishment of religious freedom (12 Hening 84). At the time of the ratification of the Constitution, Virginia, North Carolina, New Hampshire, New York and Rhode Island proposed that it should be amended to contain a declaration of religious freedom (H. V. Ames, Amendments to Constitution, Report of American Historical Association, 1896, Vol. 2, p. 307).

those subjects" (*Ibid.* p. 342). Religion obviously encompasses more than mere belief, faith, sentiment or opinion. By its very force it embraces human conduct expressive of the relation between man and God. This was clearly realized by Thomas Jefferson in the Act Establishing Religious Freedom in Virginia.[20]

What constitutes free exercise of religion cannot perhaps be dogmatically determined. It is a case where this Court must prick out a line—here one between conscience and a command of the State. In doing so this Court must proceed upon the principle so succinctly phrased by Mr. Chief Justice Taney in *Dred Scott* v. *Sandford*, 19 How. 393, 49:

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[20] The Act Establishing Religious Freedom reads, *in toto*, as follows:

I. WHEREAS Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right; that it tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who

"But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself."

Although in the past this Court has had only rare occasions to consider this fundamental question, the few adjudicated cases nevertheless offer reliable guide posts.

The issue was first presented to this Court in *Reynolds* v. *United States*, 98 U. S. 145. And in that case this Court adopted as a test of conduct sanctioned by the First Amend-

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do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; *that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order;* and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them:

II. *Be it enacted by the General Assembly*, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

III. And though we well know that this assembly elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; *yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.*" (12 Hening's Statutes at Large, pp. 84-86.) (Italics added.)

ment the one proposed by Thomas Jefferson in the act establishing religious freedom, namely, all action other than an overt act against "peace and good order". In discussing the old common law case of *Regina* v. *Wagstaff*, 10 Cox Crim. Cases, 531, the Court suggested that the State would prohibit only an "overt act" or "a positive act". The overt act in the *Reynolds* case was polygamy performed, it was claimed, to carry out the duty imposed upon all male members of the Church of Jesus Christ of Latter-Day Saints. The Court unanimously affirmed the judgment of the Court of the Territory of Utah, holding that polygamy was an overt act which could be prohibited by the State.

In *Davis* v. *Beason, supra,* the question, in essence, was whether legislation forbidding a polygamist or one who teaches or encourages polygamy from voting or holding office in the Territory of Idaho violated the constitutional guarantee of religious freedom. In an opinion deciding that the legislation was not unconstitutional, Mr. Justice Field reaffirmed the test enunciated in *Reynolds* v. *United States, supra,* in these words:

> "It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society" (*id.* p. 342).

The clash between the prohibition of the practice of polygamy and the exercise of religious freedom arose again in a new form in *Mormon Church* v. *United States,* 136 U. S. 1. Mr. Justice Bradley disposed of it in this manner:

> "* * * *This is altogether a sophistical plea.* No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to con-

demnation and punishment by the civil authority" (id. pp. 49-50). (Italics added.)

With the same phrase, "sophistical plea" the District Court in *Shapiro* v. *Lyle*, 30 F. (2d) 971, (D. Ct. W. D., Wash.) dismissed the contention that the National Prohibition Act by prohibiting the unlimited use of wine encroached upon religious freedom. However, the Court pointed out that the Act did permit the use of a limited amount for religious purposes and also made provision for extra supply under extraordinary circumstances. In fact, this decision not only shows that Congress in its legislation protected conduct embraced in the exercise of religious freedom, but further that the Court considered that Congress was legally constrained to do so.

Cooley in his treatise, Law of Torts, establishes this line between acts permitted to citizens in the exercise of their religion and acts which can be prohibited by the State:

> "Religious liberty in any country cannot embrace those things which the moral sense or sense of decency of the general public condemns, and which consequently cannot be allowed without injury to the public morals." Law of Torts, Third Ed., Vol. I, p. 39).

The only decision relating directly to the bearing of arms by a person who has conscientious religious scruples is *State* v. *Hutterische Bruder Gemeinde* (46 S. D. 189; 191 N. W. 635). In this case the Supreme Court of South Dakota held that a member of the Hutterische Society, the purpose of which was the promotion of the Christian religion, worship, religious education and teachings and of which the tenets provided that no member should either engage in war or pay a tax especially raised for the prosecution of war, need not bear arms during the World War. After pointing out that the Society did not engage in any unlawful or immoral pursuits or occupations and that it was not opposed to civil government, though claiming religious liberty, the Court in its opinion stated:

"And many times it has been held by Federal and State courts that religious associations and corporations similar to the Hutterische Bruder Gemeinde corporation are not inimical to, or in contravention of, public policy nor good morals. Order of St. Benedict v. Albert Steinhauser, 234 U. S. 640, 34 Sup. Ct. 932, 58 L. Ed. 1512, 52 L. R. A. (N. S.) 459, Ann. Cas. 1917A, 463; Goesele v. Bimeler, 14 How. 589, 14 L. Ed. 554; Schwartz v. Duss, 187 U. S. 8, 23 Sup. Ct. 4, 47 L. Ed. 53; Schriber v. Rapp. 5 Watts (Pa.) 351, 30 Am. Dec. 327; Burt v. Oneida Comm., 137 N. Y. 346, 33 N. E. 307, 19 L. R. A. 297; Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; Gasely v. Separatists' Society, 13 Ohio St. 144; Waite v. Merrill, 4 Greenl. (Me.) 102, 16 Am. Dec. 238; Gass v. Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446; Santa Clare Female Society v. Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776; State v. Amana Society, 132 Iowa, 304, 109 N. W. 894, 18 L. R. A. (N. S.) 909, 11 Ann. Cas. 231. In *Waite* v. *Merrill*, supra, the Court said:

> 'We must remember that in this land of liberty, civil and religious, conscience is subject to no human law; its rights are not to be invaded or even questioned, so long as its dictates are obeyed, consistently with the harmony, good order and peace of the community. With us, modes of faith and worship must always be numerous and variant; and it is not the province of either branch of the government to control or restrain them, when they appear sincere and harmless' (pp. 206-207) * * *.

"It is universally held that religious organizations, corporate or otherwise, whose beliefs and practices do not lead to licentiousness, the invasion of the rights of others, or to practices inconsistent with the peace, safety, or moral welfare of the State, are not against public policy" (pp. 207-208).

In fact, the Court, in its opinion, recognized that persons having conscientious religious convictions against bearing arms enjoy a constitutional right not to be forced to do so. On this point the opinion of the Court reads:

"The Congress of the United States, *recognizing the constitutional rights of persons to adhere to conscientious convictions, as non-combatants in time of war*, enacted Section 4, c. 15, Act of May 18, 1917, and Section 2, c. 166, Act August 31, 1918 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 2044d), with a proviso exempting such persons from the provisions of the selective drafts * * *" (p. 207) (italics added).

The Supreme Judicial Court of the State of Maine, stated in *Dole* v. *Allen, supra,* at pages 529-530:

> "It is one of the known tenets of this denomination of Christians, that it is not lawful to engage in war, or bear arms, or to do any other act preparatory to a state of war. It is true, that during our revolutionary struggle, a portion of them, upon the principle of necessary self-defence, did take part with their country, in their endeavors to repel the enemy; but this was regarded as a departure from their general principles, and however justified by the dictates of patriotism and sound morality, it was held by a majority of their brethren to be inconsistent with the purity of their religious profession. If those who take a more enlarged view of the relations of mankind with each other, and the danger to which, in their present moral condition, the most unoffending are exposed, are impressed with the necessity of arming in defence of their rights, it does not accord with the temper of the times to enforce the performance of this duty upon those who, from religious scruples, cannot do so without violating their consciences. Such are left to contribute their proportion to the general good by cultivating the arts of peace. Accordingly, both in Massachusetts and in this State, Friends or Quakers, have been by law exempted from military duty."

In conclusion, therefore, we submit, in the light of the prior adjudication of this Court and of other courts, that the constitutional protection of religious freedom does embrace conscientious scruples against bearing arms in a war. It is a far cry, both in principle and in policy, from the enactment of criminal statutes against polygamy to legislation forcing

citizens to bear arms against their conscientious religious scruples. In none of the cases decided by this Court is there the slightest indication that this Court would countenance any attempt by Congress to compel a citizen to flout the will of God and commit what in his sincere belief is none other than murder. The distinction between prohibiting an overt act against peace and good order and ordering affirmative action is not a shallow one. Nor can it be said that a desire to preserve one's religious scruples is merely "a sophistical plea". The Circuit Court of Appeals correctly applied to the bearing of arms by a person having conscientious religious scruples the test formulated in *Reynolds* v. *United States, supra,* in stating (R. 24-25):

> "When a citizen does not bear arms without obstructing the prosecution of a war or attempting to influence others, there is no act against society. The Government will not go to the extent of forcing a citizen with conscientious or religious scruples to take up arms and commit what seem offenses to that citizen entering into warfare. The Supreme Court has said that this is a 'religious Nation' (Church of the Holy Trinity vs. United States, 143 U. S. 453, 470) and that 'the genius and character of our institutions are peaceful' (Fleming vs. Page, 9 How. (50 U. S.) 602, 614). A person's declination to bear arms is not an act against peace and good order, nor contrary to the Constitution and laws of the United States, if such refusal be based upon conscientious scruples against the practice."

That a citizen should have conscientious religious scruples against bearing arms in an unjustified war is not startling. Unfortunately not all wars are just. The distinction between a morally justified and unjustified war is recognized by international jurists. Vattel, Law of Nations, Book III, Ch. 3, secs. 24, 29, 33, 34, 39; Hall, International Law, 8th ed., Ch. 3, sec. 16; Wheaton, International Law, 6th ed., Vol. 2, p. 630; Oppenheim, International Law, 4th ed., Vol. 2, sec. 63.

The best evidence that this country admits that some wars may be morally unjustified is the recent Kellogg Pact.[21] Such a principle forms the very core of the short treaty which has become part of the supreme law of the land.

Following the high purpose of the Kellogg Pact, the respondent seeks to maintain peace and to abolish war, an aim which this Court in the *Schwimmer* case stated to be in harmony with the Constitution and policy of our Government (279 U. S., at p. 652). Since it is to be assumed that the Government will execute in full the obligation solemnly undertaken in the ratification of the Kellogg Pact, a Christian citizen, such as the respondent, will have slight occasion, indeed, to confront a clash between the military demands of his government and the dictates of his conscience. Furthermore, assuming that the Government should by chance come into the hands of persons who would declare a war instead of seeking a solution of the dispute by pacific means as provided for in the Kellogg Pact, must a Christian citizen who considers such a war not to be justified by what he earnestly believes to be the will of God, nevertheless take up arms and fight? We hesitate to believe that the Government seriously contends that all Christian citizens should be reduced to conscienceless serfs.

When one enters society it is obviously necessary in order to achieve conditions of safety and protection for body and goods that one restrict or surrender certain rights. Yet there remains a residuum of rights which are not granted to society but are "retained by the people". This principle is safeguarded by the Ninth Amendment of the Constitution of the United States, reading:

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[21] "Art. I. The high contracting parties solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Art. II. The high contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Granting, as President Washington stated in his letter submitting the new Constitution to Congress, that

> "It is at all times difficult to draw with precision the line between those rights which must be surrendered and those which may be reserved; * * *." (Journal of Congress, Vol. 13, pp. 159, 160),

yet Story unequivocally considers that the rights of conscience are among those that cannot be intruded upon by civil authority.

> "The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as revealed religion." (Constitution, Vol. 2, Section 1876.)

From a question asked by the District Court (R. 12), it appears that the Court believed it would be disastrous to the cause of good government for citizens to take the position of the respondent. And the Government in its brief seems to share this fear (Br., p. 11). Unfortunately, not all citizens are of the high conscientious calibre of the respondent. Moreover, applicants for naturalization, such as the respondent, are indeed rare. Somehow our country has flourished for many decades despite the presence in its midst of a few citizens who have conscientious religious scruples against bearing arms. Such citizens, in fact, have been treated by the Government as a much desired element in our varied citizenry.

Although, on the one hand, government cannot exist if each citizen believes that he has the right to defy its orders, the refusal to bear arms against one's conscientious religious scruples is not a disobedience of our laws. Only confused

thought leads to the conclusion that the position of the respondent violates the theoretical rule of government by the majority. Government by the majority acting through Congress is limited in its powers. It cannot override the conscientious religious scruples of a citizen by forcing him to bear arms in a war. The fifty-one per cent majority rule cannot dictate to a citizen what action would be justified by the will of God. The two domains are separate. The collapse of a republican form of government with a substitution of anarchy is not a probable consequence of the refusal by a citizen to bear arms in a war against his conscientious religious scruples.

The theory that under our Government the rights of conscience are inalienable has been emphatically expounded by the Supreme Judicial Court of New Hampshire in *Hale* v. *Everett*, 53 N. H. 9, 60, 61.

> "This right is not conferred by this article but only declared, stated, asserted, as something inherent in the people—a right they had before this declaration of rights, as much as after. It is one of the 'natural, essential and inherent rights' that belong to all men, as declared in Art. II, some of which they may 'surrender up to society in order to secure the protection of others', as is declared and set forth in Art. III. But it is also one of those *rights of conscience* which is declared in Art. IV to be not only a natural right, but an 'unalienable' right; in its very nature, one which cannot be surrendered to government or to society, because no equivalent can be received for it, and one which neither the government nor society can take away, because they can give no equivalent; one of the 'natural, essential and inherent rights' which belong to all men,—and not only that, but an unalienable right which a man cannot surrender, and which government or society cannot take from him as declared in Art. V. 'Every individual has a *natural* and *unalienable* right to worship God, according to the dictates of his own conscience and reason'; and it is also his 'natural and unalienable right' not to be 'hurt, molested, or restrained in his person, liberty, or estate, for worshipping God in the manner and season most

agreeable to the dictates of his own conscience, or for his religious profession, sentiments, or persuasion', provided he does not disturb others. * * *

"The framers of the Constitution were very careful to state and declare the distinction between mere civil or political rights, although they were 'natural, essential, and inherent' rights belonging to 'all men' (Art. II), and the 'rights of conscience', which had the additional quality and excellence of being 'unalienable'. These merely civil or political rights could be surrendered to the government or to society (Art. III) in order to secure the protection of other rights, but the rights of conscience could not be surrendered; nor could society or government have any claim or right to assume to take them away, or to interfere or intermeddle with them, except so far as to protect society against any acts or demonstrations of one sect or persuasion which might tend to disturb the public peace, or affect the rights of others."

POINT III.

A promise to forego a privilege enjoyed by a native born citizen under the Constitution and Laws of the United States cannot be exacted of an alien as a condition of his naturalization.

The process of naturalization, as described by Attorney General Jeremiah S. Black in 1859, is the act of adopting a foreigner and clothing him with all the privileges of a citizen. His exact words are:

"What, then, is naturalization? There is no dispute about the meaning of it. The derivation of the word alone makes it plain. All lexicographers and all jurists define it in one way. In its popular, etymological and legal sense, it signifies the act of adopting a foreigner and clothing him with all the privileges of a native citizen or subject.

There can be no doubt that naturalization does *ipso facto* place the native and the adopted citizen in pre-

cisely the same relations with the government under which they live, except in so far as the express and positive law of the country has made a distinction in favor of one or the other" (Opinions of Attorney General, (U. S.) Vol. 9, p. 359).

Mr. Chief Justice Fuller in *Boyd* v. *Nebraska*, 143 U. S. 135, 162, similarly defined the process of naturalization.

While it is true that there are two classes of citizens, native born and naturalized, nevertheless a naturalized citizen enjoys all the privileges of a native born citizen with the sole exception of eligibility to the office of President.

Luria v. *United States*, 231 U. S. 9;
Osborn v. *United States Bank*, 9 Wheat. 738, 827;
Elk v. *Wilkins*, 112 U. S. 94, 101.

In the *Osborn* case, *supra*, at page 827, Mr. Chief Justice Marshall stated, "he [a naturalized citizen] is distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction; the law makes none." Mr. Justice Van Devanter restated the principle in the recent *Luria* case, *supra*, at page 22, "Under our Constitution, a naturalized citizen stands on an equal footing with a native citizen in all respects, save that of eligibility to the Presidency."

It is a current conception that the naturalization of an alien is the granting of a favor. Yet once Congress has prescribed the terms and conditions which an alien must satisfy in order to become a citizen, the alien has a right of which no court can deprive him. A court, in passing upon a petition for naturalization, "exercises judicial judgment" and "does not confer or withhold a favor."

Tutun v. *United States*, 270 U. S. 568, 578.

In refusing to give a blanket promise to bear arms in some undefined future war from which his conscience dictated by

the will of God may urge him to refrain, the respondent is not demanding a privilege or a favored position not enjoyed under our Constitution. This an alien cannot ask. On the other hand, we submit that Congress cannot exact from an alien at the time of his naturalization a promise that he will forego a privilege granted by the Constitution and laws of the United States. The power of Congress in dealing with naturalization is not unshackled.

> *Osborn* v. *United States Bank*, 9 Wheat. 738, 827;
> *United States* v. *Wong Kim Ark.*, 169 U. S. 649, 703;
> *Downes* v. *Bidwell*, 182 U. S. 244, 289;
> *Pollock* v. *Farmers' Loan and Trust Company*, 157 U. S. 429.

In the *Osborn* case, *supra*, at page 827, Mr. Chief Justice Marshall lucidly presented the limitation upon the power of Congress with respect to naturalization.

> "A naturalized citizen is, indeed, made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. *The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.* The Constitution then takes him up, and among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue." (Italics added.)

In the *Wong Kim Ark* case, *supra*, at page 703, Mr. Justice Gray wrote:

> "Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing

for the naturalization of parents or children of a particular race can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation."

If Congress, therefore, has no power to abridge the rights conferred by the Constitution upon naturalized citizens, we submit that in the quotation of Mr. Justice Gray another *a fortiori* may be substituted, namely, that Congress has no power to prescribe an abridgement of those rights so conferred by the Constitution as a condition of an alien becoming a naturalized citizen.

To demand from an alien who desires to be naturalized an unqualified promise to bear arms in every war that may be declared, despite the fact that he may have conscientious religious scruples against doing so in some hypothetical future war, would mean that such an alien would come into our citizenry on an unequal footing with the native born, and that he would be forced, as the price of citizenship, to forego a privilege enjoyed by others. That is the manifest result of the fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so.

That such a demand would be improper becomes apparent from a consideration of other situations. For instance, Congress would be clearly violating provisions of the Constitution if, in providing for a uniform rule of naturalization, it should require an alien to promise that once he becomes a citizen he will not be entitled to the privilege of holding political office or to the right of free speech or to the right to be secure against unreasonable searches and seizures, or to the protection of the due process clause.

We fail to understand the statement of the Government (Br., pp. 9 and 18) that the principle enunciated by the Circuit Court of Appeals that no more is demanded of an alien who becomes a citizen than of a native born citizen is an irrelevant consideration (R. 25). As we have pointed

out, to allow the contention of the Government would necessarily give rise to two classes of citizens—unequal before the law. Our Constitution, however, does not contemplate or permit the creation and existence of such classes of citizens, enjoying different rights and privileges and subject to different duties and obligations.

POINT IV.

The decision of the Circuit Court of Appeals accords with that of this Court in *United States v. Schwimmer*, 279 U. S. 644.

The Government, of course, contends in its brief, as it did before the Circuit Court, that there is no valid distinction between the case before this Court and the *Schwimmer* case. It should first be stated, however, that the issues in the *Schwimmer* case came before this Court in a very different manner, and varied essentially in their nature from the issues here presented. By the record in the petition of Rosika Schwimmer it appears the District Court was never presented with facts sufficient in its opinion to conclude that the applicant satisfied the requirements of the Naturalization Act. In reviewing denial of citizenship to her, this Court proceeded on the theory that there was discretion in the District Court on the facts, and that this Court should not set its judgment as to the facts above that of the District Court. The decisive element of the opinion of this Court, as we understand it, was that the applicant failed to sustain the burden upon her *"to show what she meant* and that her pacifism and lack of nationalistic sense did not oppose the principle that it is a duty of citizenship by force of arms when necessary to defend the country against all enemies, and that her opinions and beliefs would not prevent or impair the true faith and allegiance required by the Act". In the petition now before this Court, on the other hand, the bald question is one of law: must an applicant purchase citi-

zenship by surrendering his conscientious religious scruples against bearing arms.

But apart from the dissimilarity of the definite questions presented to this Court for its review on the two appeals, a comparison of the record of the respondent's petition for naturalization with that of Rosika Schwimmer discloses that the attitude, beliefs and opinions of the respondent differ completely and radically from those of Rosika Schwimmer. The arguments presented by the respondent in this case were not made to the Court in the *Schwimmer* case.

In fact, the Government itself anticipated the fundamental difference between the two cases when it stated in its brief presented to this Court in *United States* v. *Schwimmer*, that *"refusal to perform military service on account of religious scruples is not involved in this case"* (Government's Brief in No. 484, October Term, 1928, at p. 17).. The respondent's primary desire was the protection of his right not to bear arms in a war which his conscience, dictated by the will of God, might consider to be morally unjustified. Therein lies the formula for the proper understanding of his answers and statements. In brief, his attitude is that of every intelligent Christian man or woman.

In the *Schwimmer* case the applicant declared that she had "no sense of nationalism", "no nationalistic feeling", and "only a cosmic consciousness of belonging to the human family" (279 U. S. at p. 648). The existence of this element in the *Schwimmer* case was in itself sufficient to justify denial of citizenship. Apart from her willingness to bear arms, it clearly appears that she would not recognize or give to the United States the modicum of allegiance which the status of citizenship by its nature requires of every citizen. This respondent, on the other hand:

> "stated further that he was ready to give to the United States, in return for citizenship, all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God. The appli-

cant explained that if he were to be a citizen of the United States he would recognize special duties and obligations by virtue of that citizenship over and above his general duty to humanity as such. The applicant believed that the international outlook he advocated would not mean the doing away of nationalism" (R. 12).

We submit that no Christian of any denomination, no deeply religious man of any faith could promise more. The respondent's views as to the religious duty of a law-abiding Christian clergyman, when confronted with a hypothetical conflict between his conscience and the demands of the state, may differ from those of the Department of Labor, but they accord with an unbroken line of Christian thought beginning at least as early as St. Augustine. The Government would hardly contend that any member of the various denominations subscribing to the doctrines set forth in the footnote on this page is ineligible to American citizenship.[22]

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[22] At a recent meeting of the General Assembly of the Presbyterian Church held in June, 1930, the following resolution was adopted:

"Whereas, the General Assembly has repeatedly declared the aversion of the Church to the settlement of international differences by war, or by the appeal to arms, and its belief in the substitution therefor of peaceful processes of conference and adjudication; and

Whereas, the Standards of the Church declare 'that God alone is Lord of the conscience', and

Whereas, the Church has always taught that it is the duty of men to obey their conscience in the fear of God and in fidelity to His Word; and

Whereas, all should stand on the same basis of principle enjoying equal rights and having equal duties in the Church and in the State:

Therefore, Resolved, That the Assembly declares its belief that the right and duty of citizenship should not be conditioned upon the test of ability or willingness, contrary to conscience, to bear arms or to take part as a combatant of war."

The Universalist General Convention at Syracuse, New York, held on October 24, 1925, adopted this resolution:

"Whereas, a cardinal principle of the Universalist Church is that of allegiance to 'the Spiritual Authority and Leadership of Jesus', to be interpreted by its members as their conscience may direct; and whereas, there are those among its members who interpret this authority as a complete condemnation and renunciation

The Government appears to challenge the allegiance offered by the respondent. It states in its brief (at p. 16) that "we are not concerned with his willingness in the past to serve the sovereign to whom he has foresworn allegiance but with his new allegiance to the United States". The Government has obviously overlooked the services rendered by the respondent to the American Army and the country prior to his naturalization (R. 10). This fact was somehow again disregarded by the Government in its summary of the facts of the case (Br. at p. 3). Despite this basic difference in the nature of the allegiance offered by the two applicants the Government endeavors to assimilate the views of the respondent to those of Rosika Schwimmer. It states in its brief that "His judgment and conscience in this respect would be governed by his views as to the best interests of humanity:

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of violence between nations as well as between individuals, operative even in time of war itself; therefore, be it

Resolved, that the fifty-fifth convention of the Universalist Church recognizes as being in accord with our fundamental principles the right of members of this Church to refuse on conscientious grounds to participate in any warfare."

At the Washington Meeting of the Executive Committee of the Federal Council of Churches held in Washington in December, 1930, a "Message to the Churches" was adopted containing the following paragraphs:

"We hold that our country is benefited by having as citizens those who unswervingly follow the dictates of their consciences, and who put allegiance to God above every other consideration, and that a policy of denial of naturalization to aliens of such character is contrary to the ideals of a nation into whose very structure the principle of political and religious liberty has been built. * * *

Furthermore, we believe it to be the duty of the churches to give moral support to those individuals who hold conscientious scruples against participation in military training or military service. We recommend that the various communions take appropriate action to this effect."

The Second Study Conference at which representatives of thirty-five communions and allied religious organizations attended, held in Columbus, Ohio, March 6-8, 1929, adopted a "Message to the Churches" which read, in part, as follows:

"We hold that 'Christians should be good citizens, obeying the laws of the State and being subject to its authority up to the

It is difficult to conceive of a more vague and intangible basis for allegiance than this" (Br. at p. 16). Such argument must fail in the face of the respondent's statements.

Again, Rosika Schwimmer declared that she "was willing to do everything that an American citizen has to do except fighting", and "I am not willing to bear arms" (279 U. S. at p. 648). The respondent, on the other hand, voluntarily enlisted in the Canadian Army and subsequently in the American Army during the World War, and has shown, by deeds as well as by words, his willingness to defend our Government by force of arms. To question 22 of the preliminary form for naturalization, reading: "If necessary, are you willing to take up arms in defense of this country?", the respondent answered affirmatively (R. 5). Rosika Schwimmer

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point where obedience to man would be disobedience to God', and that the Churches should teach patriotic support of the State, in the conviction that the State is bound by the obligations of the [Kellogg] Pact never to resort to war but to use only peaceful means for the solution of all controversies.

We hold that the Churches should support and sustain with moral approval individuals who, in the exercise of their right of conscience, refuse to take part in war or in military training."

The Third Study Conference of representatives of thirty-seven communions and allied religious organizations held in Evanston, Illinois, on February 25-27, 1930, adopted a "Message to the Churches" containing the following:

"We find in this conviction additional reason for calling upon our Government to respect the principle of free conscience with regard to war, and we affirm the duty of the Church to support with moral approval individuals who hold conscientious convictions against participation in military training or military service."

The New York East Conference of the Methodist Episcopal Church, held in Brooklyn, New York, submitted a report which was adopted on April 7, 1930. In this report it is stated:

"We believe that we would be false to the spirit of the Master and to the trust reposed in us as religious teachers if we were to allow religious liberty and freedom of conscience to be violated without protest.

We commend adherence to the principle of liberty of conscience. We believe that there are higher loyalties, such as to God and man, which may transcend a narrow nationalism in the conscience of the individual; and we regret that allegiance to these

answered this same question as follows: "I would not take up arms personally" (279 U. S. at p. 647).

And there is still another obvious difference between the two cases. Rosika Schwimmer stated that she was "an uncompromising pacifist" (279 U. S. at p. 648). This record, on the other hand, shows that,

> "while devoted to the cause of peace, the applicant stated that he was not a pacifist in the ordinary sense of that term, because it did not seem to him that Christian principles required absolute pacifism on the part of all. * * * The applicant declared that he believed that there was a rightful place for the use of force by the army and navy in the exercise of police functions in national or international relations and that there were circumstances under which such force could also be justifiably used, for instance, to repel invasion, or even to defend a weaker

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higher loyalties may make it impossible for one to become a citizen of the United States".

In this connection, it is interesting to note the resolution recently passed at the Lambeth Conference of 1930 of the Church of England and of representatives of the Episcopal Church in America. The resolution reads in part as follows:

> "War, as a method of settling international disputes, is incompatible with the teaching and example of our Lord Jesus Christ. * * * We do not deny the right of a nation to defend itself if attacked, or to resort to force in fulfillment of international obligations, but it is the duty of the Christian Church to create a world-wide public opinion which will condemn a nation that resorts to war from a motive of self-interest or a mistaken conception of honour as guilty of a crime against humanity. * * * The Christian Church can make no terms with the idea expressed in the phrase, 'My country, right or wrong'. *Great as is the debt of service that a man owes to his Fatherland, the claim of Christ remains supreme,* and the state can only demand the wholehearted loyalty of its citizens when its action is guided by the same moral principles as the private citizen is taught to apply in relations with his neighbours. * * * If the Christian Church in every nation could refuse to countenance or support a declaration of war by its own government unless that government had inaugurated or accepted a bona-fide offer to submit the dispute to arbitration, it would be doing no more than insisting on the fulfillment of pledges solemnly made" (Report, pp. 98-100). (Italics added.)

Should the contention of the Government in this case prevail any member of the Church of England subscribing to these resolutions would thereby be precluded from becoming an American citizen.

nation. Since it would be neither wise nor right for the nation to adopt absolute and unconditional pacifism, the applicant did not believe any moral necessity rested upon him to adopt an unconditionally pacifist position" (R. 13-14).

In the light of these views we believe that there is no ground upon which this Court can apply the conclusion reached in the *Schwimmer* case, namely, that the respondent "may be opposed to the use of military force as contemplated by our Constitution and laws" (279 U. S. at p. 652).

The respondent, moreover, considers that a Christian citizen must decide for himself whether according to his conscience he would be morally justified in killing others in a particular war. He recognizes that two Christians may well reach different conclusions. Hence, although he might believe *he* would be violating the will of God in bearing arms in a particular war, he does not anticipate engaging "in any propaganda against the prosecution of a war which the Government had already declared and which it considered to be justified" (R. 13), or in altering the opinion of others. Even during a war, however, which he might regard as unjustified, he stated that he would still regard himself as under moral obligation not to do anything that would injure his country (R. 12-13). His attitude is unquestionably that of a righteous, peace-loving, law-abiding member of society.

And yet the Government in its brief (at p. 14) appears to stress the fact that the applicant reserved to himself the right to determine whether he would engage in propaganda against the prosecution of any war which he might not deem morally justified. At most this reservation is the retention of a right granted to every citizen of this country. Even in time of war this Court has scrupulously guarded the right to freedom of speech. The respondent is not asking a special right not otherwise enjoyed by citizens. He does not anticipate or desire to exceed the bounds imposed by the laws of this country. "In any case he did not question that the Government, under certain conditions, could regulate and

restrain the conduct of the individual even to the extent of imprisonment" (R. 13). On the other hand, he does not want to preclude himself in advance from exercising his constitutional freedom of speech. It is recalled by this Court that Abraham Lincoln,[23] James Russell Lowell,[24], Ralph Waldo Emerson,[25] Thomas Corwin, Joshua R. Giddings, Theodore Parker and many others, vigorously expressed their opposition to the prosecution of the Mexican War. Our country has always welcomed and should continue to welcome the considered opinion of high minded conscientious men, such as the respondent. In the vital question of peace or war who is better qualified to express an opinion than this thoughtful religious teacher? More and more it becomes evident that the Government contends in this case for the naturalization only of persons who will become uniform, unthinking, slavish robots. The Government would demand that right and wrong, God and conscience be bent to nationalism. It is a doctrine fit only for despots. Such a hope is inconsistent with the background and policy of our country and, moreover, detrimental and devitalizing to its future "good order and happiness".

As a matter of fact, the respondent fully satisfies the test enunciated by this Court in *United States* v. *Schwimmer*. The core of that decision is that the applicant had failed to support the burden resting upon her to show that her uncompromising pacifism, her lack of nationalistic feeling, and her "cosmic sense of belonging to the human family" did not oppose "the principle that it is the duty of citizenship by force of arms when necessary to defend the country against all enemies" (279 U. S. at p. 563). If such is the test the respondent has met it; for he not only recognizes but favors that principle, and has proved his adherence to it by his acts. In no way did this Court intimate that an applicant for citizenship must without qualification declare his belief in the

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[23] Beveridge, Life of Lincoln (5th ed. 1928), Vol. 2, p. 424.

[24] See his Biglow Papers.

[25] See his Ode to W. H. Channing.

doctrine "My country right or wrong", or that he must agree in advance to take up arms and fight in any and every war that may ever be declared, even if it violates his honest conscientious religious scruples.

Induction into American citizenship is a serious business, not a mere ceremony. Congress having erected certain standards has committed to the courts their application to the individual. If the courts are to be guided solely by questionaires devised in the Department of Labor, the whole process is at once degraded from a judicial inquiry to the base level of a bureaucratic ritual.

CONCLUSION.

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A.

Provisions of Acts and Statutes Enacted Prior to the Adoption of the Constitution Relating to Exemptions from Militia Service.

During the Colonial period and the period between the Revolutionary War and the adoption of the Constitution, the legislation of all of the Colonies and the thirteen original States allowed a citizen to obtain a substitute in place of his rendering personal service in the militia. Moreover, Virginia, Massachusetts, North Carolina, New Hampshire and New York explicitly granted exemption from military service to Quakers and members of other religious sects whose doctrine does not tolerate war.

In the early Militia Act of Virginia of 1738, we find:

> "Nothing herein contained, shall be construed to compel any persons herein after-mentioned, to a personal attendance at musters: * * * or any of the people commonly called Quakers: yet all the persons aforesaid, shall, and are hereby required, to send one able bodied man" (5 Hening 16).

A similar provision is contained in the Act of 1766 continuing this Militia Act (8 Hening 241, 242-243). In the Draft Act passed by Virginia to supply its quota for the Continental Army it was provided:

> "And be it enacted, That quakers and menonists who shall be so draughted shall be discharged from personal service, and that the field officers and justices who attend the draught shall, and they are hereby empowered, to employ any two or more discreet persons to procure, upon the best terms they can, proper substitutes to serve in their stead, and to adjust and divide the charge thereof among all the members of their respective societies of quakers and menonists in the county, in proportion to the number of tithables in the family of or belonging to each member, and to authorize the sheriff of the county,

by warrant under their hands, to levy * * *" (9 Hening 337, 345).

Substantially similar provisions were contained in two other draft acts passed in 1780 (10 Hening 257, 261; 326, 334). See also the Militia Act of 1776 (9 Hening 189). In the Draft Act to provide soldiers for the Continental Army, passed in 1782, it is provided:

> "That where any quaker or menonist shall be drafted in consequence of this act, he shall not be compelled to serve, but shall pay to the collector of his district the sum of fourteen pounds, * * *" (11 Hening 14, 18).

In Massachusetts, legislation usually provided that the Treasury should pay to obtain substitutes for Quakers. This money, however, was subsequently to be collected by a special levy upon Quakers. In the Militia Act of June 15, 1758, passed to raise men for an expedition against Canada (Acts and Resolves, Vol. 4, pp. 157, 159) it was provided:

> "* * * it is among other things enacted, that in every regiment in which there are any of the people called Quakers, liable to be impressed, the colonel or chief officers of such regiment be impowered and required to engage and employ a sum not exceeding thirteen pounds six shillings and eight pence per man, in order to hire into the service so many men as would have been liable to be impressed from the people called Quakers, in a due proportion to the other part of the regiment; the sums so engaged to be paid out of the public treasury and to be levied in the next tax-act upon the people called Quakers, in such manner and proportion as shall be therein ordered."

In a similar act passed on March 28, 1759, (Acts and Resolves, Vol. 4, pp. 191, 193) it was provided:

> "*And whereas* the people called Quakers alledge (sic) a scruple of conscience against any military service, and persist in their neglect or refusal to attend on military musters,—

Be it enacted [sect. 4] That such of the inhabitants of this province as profess themselves to be of the people called Quakers, shall be and hereby are declared to be exempt from the fines and forfeitures for not attending on military musters, and for not attending the service upon an impress, anything in this act to the contrary notwithstanding."

Exemptions in behalf of persons having religious scruples were also made in the Militia Acts of 1776 and 1781 (Acts and Resolves, Vol. 5, p. 445; Laws of 1781, Ch. 21) and in acts passed in 1776 and 1781 to reinforce the Continental Army (Acts and Resolves, Vol. 5, p. 595; Laws of 1781, May Session, Ch. 38).

In North Carolina we find in the Militia Act of 1778 (24 State Records 190, 193) the following provision:

"* * * that all persons within the age of Sixteen and fifty shall be liable to be drafted, obliged to serve or find an able bodied person in his room, provided that * * * Quakers, Menonists, Dunkers, Moravians, * * * shall be exempted from a draft* * *."

A similar provision is found in the Militia Act of 1781 (24 State Records 358, 361). In an act passed by the General Assembly of North Carolina to raise men to complete the Continental Battalions (24 State Records 154, 156) it was provided:

"And be it further Enacted, That the Quakers, Dunkers, Moravians, and Menonists, shall furnish Men in Proportion to their respective Numbers in each County, and in Default thereof, the commanding officer of each and every County is hereby empowered to hire Men instead of the Men to be by them furnished, and by Warrant under his Hand, directed to the Sheriff of the County, to levy the Sum given for such Man or Men on the Goods and Chattels, Lands and Tenements of any Person belonging to such Sect, as shall refuse or fail to find a Man or Men agreeable to this Act."

The Act of March 17, 1780, forming the militia of the State of New Hampshire (4 Metcalf 273, 274), provides:

> "That the Training Band So Called Shall Consist of all the able Bodied Male Persons within the State from Sixteen years old to Fifty years old; (Excepting * * * People Denominated Quakers) * * *."

In New York it was usual to include in the Colonial Laws a provision whereby Quakers and United Brethren could claim an exemption from bearing arms by paying a certain sum. For instance, by the Militia Law of 1755 (Colonial Laws, Vol. 3, pp. 1051, 1068-1069), such persons were obliged to pay twenty shillings within three months of the enactment of the law. However, it was further provided by the law that they "shall in time of Alarm or Invasion, severally appear provided with one good spade, Iron shod shovel and pick ax and six Empty Bags, each sufficient to contain two Bushells and shall serve as Pioneers and Labourers" (p. 1069).

APPENDIX B.

Extracts from Debates of First Congress Relating to Early Federal Militia Acts.

During the First Congress General Knox, Secretary of War, submitted a plan for the establishment of a militia for the National Government. This plan he based upon certain general principles, among which he included "that every man of the proper age and ability of body, is firmly bound by the social compact to perform, personally, his proportion of military duty for the defense of the State" (Annals of Congress, Gales and Seaton's History, First Congress, Vol. II, Appendix, p. 2145). This general principle of General Knox, however, did not survive. Congress carved out an exception in behalf of persons religiously scrupulous of bearing arms. James Madison himself led the attack and offered the amendment to protect the conscience of such persons. This appears in these extracts from the debates:

"Mr. Bloodworth proposed an amendment to the second section, by which all persons exempted by the laws of the respective States should also be exempted by this law. This was objected to by several members. (Annals of Congress, Gales and Seaton's History, First Congress, Vol. II, p. 1868). * * *

"Mr. Burke. * * * He thought that all should equally be made to turn out in the ranks, high and low, rich and poor, old and young, and thus make the militia honorable. * * * He was not, however, opposed to all exemptions; he would exempt the people called Quakers, and all persons religiously scrupulous of bearings arms, (p. 1869), * * *

"Mr. Jackson. * * * Those who are exempted ought to pay a full equivalent on every principle of justice and equity (p. 1870). * * *

"Mr. Vining. * * * He adverted to the conduct of the first settlers of Pennsylvania who were Quakers; their peaceful principles were productive of the happiest consequences; and in this view their conduct had been an example, which, in proportion as mankind shall recede

from the force of turbulent passions, will be more and more imitated. He, however, supposed that an equivalent might be assessed on those people without difficulty, * * * (p. 1870).

"Mr. Boudinot. * * * He then adverted to the Quakers and asked, what would become of our independence, if 1,000 troops were to attack us, and we had an army of 10,000 Quakers to oppose them; what dependence can be had on men who are forced into the field? He had trusted that the rights of man were so well defined at this enlightened period, that the principles which had been advanced would not have been applied on this occasion. He entered into a defense of the exemptions generally provided for, and justified them on principles of justice and policy * * * (p. 1871).

"*Mr. Madison moved to insert among the exemptions, persons conscientiously scrupulous of bearing arms.* It is the glory of our country, said he, that a more sacred regard to the rights of mankind is preserved than has heretofore been known. The Quakers merit some attention on this delicate point, liberty of conscience. When they had it in their power to establish their religion by law they did not. He was disposed to make the exemption gratuitous, but supposed it impracticable. He replied to Mr. Jackson's observations, that exempting such persons would induce the people generally to turn Quakers. *He did not believe that the citizens of the United States would hypocritically renounce their principles, their conscience, and their God, for the sake of enjoying the exemption* (pp. 1871-1872).

"Mr. Sherman seconded this motion. He said that persons conscientiously scrupulous of bearing arms could not be compelled to do it; for such persons will rather suffer death than commit moral evil; they may be punished, it is true, by fines and penalties; but whether this would be eligible or not remains to be determined. * * * (p. 1872).

"Mr. Giles. * * * He was in favor of exempting every man from doing that which his general conduct evinced was contrary to his conscience; * * * (p. 1872).

"Mr. Smith of South Carolina. This debate seems to be detailed, when gentlemen appear to think very much

alike upon the subject. The question is, how the fine or penalty shall be assessed; though some appear disposed to exempt those people not only from personal service but from all commutation. * * * (p. 1873).

"Mr. Madison then renewed his proposition in favor of persons religiously scrupulous of bearing arms, in a different form from that before offered, and to the following effect:

'That all persons religiously scrupulous of bearing arms, who shall make a declaration of the same before a civil magistrate, shall be excused from performing militia duty; but be liable to a penalty of dollars, to be appropriated as the moneys arising from the post-office are appropriated.'

After some debate, Mr. Madison proposed that it should lie on the table for further consideration" (p. 1874) (italics added).

As finally passed, the act providing for a national militia exempted all persons who were in fact exempted by the laws of the various States (1 Stat. 271). Some members of Congress, however, had contended that the exemptions should have been explicitly stated by and reserved to the Federal Government.

In October of 1814, The Secretary of War submitted to the Chairman of the Senate Military Committee four plans for the conscription of soldiers (American State Papers, Military Affairs, Vol. 1, p. 515). Although Congress did not pass a conscription act at this time, it is interesting to note that Congress in its consideration of the proposed act adopted an amendment sponsored by Mr. Lewis of Virginia providing that persons "conscientiously scrupulous of bearing arms shall be exempted" (Annals of Congress, 13th Congress, Third Session, Vol. 3, pp. 774-775). The remarks made by Mr. Lewis forcefully and lucidly explain the constitutional exception to the general principle that it is the duty of a citizen to bear arms. The Annals read:

"He wished to offer an amendment to the bill, which he deemed of the first importance. There existed

throughout this country a class of industrious, respectable, and highly meritorious citizens, whose religion forbade them to engage in this trade of war. From the time when the Christian religion was promulgated, however strange the fact might appear to those whose business is the destruction of our race, there have always existed thousands who held it a most sacred duty not to imbrue their hands in the blood of their brethren, simply because their rulers had been pleased to declare them enemies. The history of centuries would prove that this was no theory, no speculative vision. It was an article of Christian faith, deemed a command of the Most High; and thousands of these pacific Christians have attested the sincerity of their faith and their practice at the stake and on the scaffold. * * * In most of the States, * * * he believed those men were excused from any kind of militia duty whatever, by paying a certain annual tax deemed equivalent to their personal services.

* * * Mr. L. said, he did not mean to ask for those people any peculiar boon beyond what the true principles of toleration demanded. Of all the pecuniary burdens of the State, the property of those men must bear its share. *He did not ask an exemption from the general weight and burdens of the State—there ought to be, there could be, no such exemption. But, as to personal service in arms, if any man conscientiously believed it was forbidden by the voice of God, no human tribunal had the right to force such a man to violate his religion and his conscience and to stain his hands with human blood.* A fair equivalent was all that any Government had the right to require from such a man, to be applied, not particularly to the work of war, but to the general purposes of Government; with this all ought to be satisfied. The equivalent ought not to be oppressive on the one hand, nor on the other ought it to be so reduced as to permit any but the really conscientious to take advantage of it for improper purposes" (Annals of Congress, 13th Congress, Third Session, Vol. 3, pp. 772-774). (Italics added.)

APPENDIX C.

Provisions in State Constitutions Exempting Persons with Conscientious Religious Scruples from Bearing Arms.

Specific provisions relative to exemption from military duty of persons whose conscientious scruples forbid them to bears arms are found in the constitutions of many States.

The Constitution of Alabama of 1819 provides:

> "Any person, who conscientiously scruples to bear arms, shall not be compelled to do so, but shall pay an equivalent for personal service." (Thorpe,* Vol. 1, page 105).

This same provision is contained in the Constitutions of 1865 and 1867 (Thorpe, Vol. 1, pages 119, 147).

The Constitution of Arkansas of 1868 provides:

> "* * * but all citizens of any denomination whatever, who from scruples of conscience, may be adverse to bearing arms, shall be exempt therefrom upon such conditions as may be prescribed by law." (Thorpe, Vol. 1, page 325.)

This provision is contained in the present Constitution (Digest of the Statutes of Arkansas, 1921, page 190.)

The Constitution of Arizona of 1910 provides:

> "The militia of the State of Arizona shall consist of all able bodied male citizens of the State between the ages of eighteen and forty-five years, and of those between said ages who shall have declared their intention to become citizens of the United States, residing therein, subject to such exemptions as now exist, or as may hereafter be created, by the laws of the United States or of this State." (Revised Code of Arizona, 1928, page xcix.)

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* All Thorpe references are to F. N. Thorpe, Federal and State Constitutions, Colonial Charters, and other Organic Laws (Government Printing Office, 1909).

The Constitution of Colorado of 1876 provides:

"No person having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace; provided, such persons shall pay an equivalent for such exemption." (Thorpe, Vol. 1, page 507.)

This provision is contained in the present Constitution (Courtright's Mills Annotated Statutes, Vol. 1, page c-264.)

The Constitution of Florida of 1868 provides:

"All able bodied male inhabitants of the State between the ages of eighteen and forty-five years, that are citizens of the United States, or have declared their intention to become citizens thereof shall constitute the militia of the State; but no male citizen of whatever religious creed or opinion shall be exempt from military duty except upon such conditions as may be prescribed by law." (Thorpe, Vol. 2, page 718.)

This provision was contained in the Constitution of 1885 (Thorpe, Vol. 2, page 755) and is found in the present Constitution (Compiled General Laws of Florida Annotated, 1927, Vol. 5, page 4440.)

The Constitution of Idaho of 1889 provides:

"* * * but no person having conscientious scruples against bearing arms shall be compelled to perform such duty in time of peace, every person claiming such exemption from service, shall, in lieu, thereof, pay * * * an equivalent in money * * *." (Thorpe, Vol. 2, page 943.)

This provision is found in the present Constitution (Idaho Compiled Statutes, 1919, Vol. 3, page 2754.)

The Constitution of Illinois of 1818 provides:

"No person or persons conscientiously scrupulous of bearing arms shall be compelled to do militia duty in time of peace; Provided such person or persons shall pay

an equivalent for such exemption." (Thorpe, Vol. 2, page 980.)

This provision was changed by the Constitution of 1870 to read:

"No person having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace; provided such person shall pay an equivalent for such exemption." (Thorpe, Vol. 2, page 1044.)

This provision is contained in the present Constitution (Illinois Revised Statutes, 1929, page 25.)

The Constitution of Indiana of 1816 provides:

"No person conscientiously opposed to bearing arms shall be compelled to do militia duty; but such person shall pay an equivalent for exemption, * * *." (Thorpe, Vol. 2, page 1067.)

This provision is contained in the present Constitution (Burn's Annotated Indiana Statutes, 1926, Vol. 1, page 138).

The Constitutions of Iowa of 1846 and 1857 provide:

"No person or persons conscientiously scrupulous of bearing arms shall be compelled to do militia duty in time of peace; provided that such person or persons shall pay an equivalent for such exemption in the same manner as other citizens." (Thorpe, Vol. 2, pages 1132, 1148.)

This provision is contained in the present Constitution (Code of Iowa, 1927, page 45.)

The Constitution of Kansas of 1855 provides:

"No person conscientiously opposed to bearing arms shall be compelled to do militia duty, but such person shall pay an equivalent for such exemption." (Thorpe, Vol. 2, page 1190.)

This provision was changed by the Constitution of 1857 to read:

"Any person whose religious tenets conflict with bearing arms, shall not be compelled to do militia duty in time of peace, but shall pay such an equivalent for personal services as may be prescribed by law." (Thorpe, Vol. 2, page 1214.)

This provision was changed by the Constitution of 1858 to read:

"* * * Excepting those who are conscientiously opposed to bearing arms * * *." (Thorpe, Vol. 2, page 1233.)

This provision was changed again by the Constitution of 1859 to read:

"* * * but all citizens of any religious denomination whatever who from scruples of conscience may be adverse to bearing arms shall be exempted therefrom, upon such conditions as may be prescribed by law." (Thorpe, Vol. 2, page 1253.)

This provision is contained in the present Constitution (Revised Statutes of Kansas Annotated, 1923, page cxliv.)

The Constitutions of Kentucky of 1792 and 1799 provide:

"Those who conscientiously scruple to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service." (Thorpe, Vol. 3, pages 1271, 1283.)

This provision was changed by the Constitution of 1850 to read:

"* * * but those who belong to religious societies, whose tenets forbid them to carry arms, shall not be compelled to do so, but shall pay an equivalent for personal service." (Thorpe, Vol. 3, page 1307.)

This provision was changed by the Constitution of 1890 to read:

"The General Assembly * * * may exempt from military service persons having conscientious scruples against bearing arms; but such person shall pay an

equivalent for such exemption." (Thorpe, Vol. 3, page 1350.)

This provision is contained in the present Constitution (Carroll's Kentucky Statutes, 1922, page cxvii.)

The Constitutions of Louisiana of 1879 and 1898 provide:

"The General Assembly may exempt from military service those who belong to religious societies whose tenets forbid them to bear arms; provided, a money equivalent for these services shall be exacted. (Thorpe, Vol. 3, pages 1501, 1587.)

This provision is contained in the present Constitution (Wolff's Constitution and Statutes, 1920, Vol. 3, page 2342.)

The Constitution of Maine of 1819 provides:

"Persons of the denominations of Quakers and Shakers, Justices of Supreme Judicial Court and ministers of the gospel may be exempt from military duty, but no other person of the age of eighteen and under the age of forty-five years, excepting officers of the militia who have been honorably discharged, shall be so exempted, unless he shall pay an equivalent to be fixed by law." (Thorpe, Vol. 3, page 1660.)

This provision is contained in the present Constitution (Revised Statutes of Maine, 1930, page 31.)

The Constitution of Maryland of 1864 provides:

"* * * but persons whose religious opinions and conscientious scruples forbid them to bear arms shall be relieved from doing so on producing to the proper authority satisfactory proof that they are thus conscientious." (Thorpe, Vol. 3, page 1773.)

The Constitution of Michigan of 1850 provides:

"* * * but all such citizens of any religious denomination whatever, who, for scruples of conscience, may be adverse to bearing arms, shall be excused therefrom

upon such conditions as shall be prescribed by law." (Thorpe, Vol. 4, page 1966.)

This provision is contained in the present Constitution (Compiled Laws of Michigan, 1915, Vol. 1, page 193.)

The Constitution of Mississippi of 1817 provides:

"Those persons who conscientiously scruple to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service." (Thorpe, Vol. 4, page 2041.)

The Constitution of Missouri of 1820 provides:

"That no person who is religiously scrupulous of bearing arms can be compelled to do so, but may be compelled to pay an equivalent for military service." (Thorpe, Vol. 4, page 2164.)

This provision was changed by the Constitution of 1865 to read:

"All able-bodied male inhabitants of this State, between the ages of eighteen and forty five years, who are citizens of the United States, or have declared their intention to become citizens of the United States, shall be liable to military duty in the militia of this State and there shall be no exemption from such duty, except such persons as the General Assembly may, by law, exempt." (Thorpe, Vol. 4, page 2214.)

This provision was changed again by the Constitution of 1875 to read:

"* * * That no person who is religiously scrupulous of bearing arms can be compelled to do so, but may be compelled to pay an equivalent for military service." (Thorpe, Vol. 4, page 2268.)

This provision is in the present Constitution (Revised Statutes of Missouri, 1921, Vol. 1, page 155).

The Constitutions of the State of New Hampshire of 1792 and 1902 provide:

"No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto,

provided he will pay an equivalent." (Thorpe, Vol. 4, pages 2472, 2495.)

This provision is contained in the present Constitution (Public Laws of New Hampshire, 1926, Vol. 1, page 7.)

The Constitutions of New York of 1821 and 1846 provide:

"* * * but all such inhabitants of this State, of any religious denomination whatever, as from scruples of conscience may be adverse to bearing arms, shall be excused therefrom by paying to the state an equivalent in money;" (Thorpe, Vol. 5, pages 2648, 2671.)

This provision was changed by the Constitution of 1894 to read:

"All able-bodied male citizens between the ages of eighteen and forty-five years, who are residents of the State, shall constitute the militia, subject, however, to such exemptions as are now, or may be hereafter created by the laws of the United States or by legislature of this state." (Thorpe, Vol. 5, page 2731.)

The provisions contained in the Constitutions of 1821 and 1894 have now been incorporated into section 6 of the Civil Rights Law. (Laws of 1909, Chap. 14).

The Constitutions of North Carolina of 1868 and 1876 provide:

"That all persons who may be adverse to bearing arms, from religious scruples, shall be exempt therefrom." (Thorpe, Vol. 5, pages 2820, 2841.)

This provision is contained in the present Constitution (North Carolina Code, 1927, page 2120.)

The Constitutions of Pennsylvania of 1790 and 1838 provide:

"Those who conscientiously scruple to bear arms shall not be compelled to do so, but shall pay an equivalent for personal service." (Thorpe, Vol. 5, pages 3099, 3111.)

The Constitution of 1874 changes this provision to read:

> "The general assembly * * * may exempt from military service persons having conscientious scruples against bearings arms." (Thorpe, Vol. 5, page 3143.)

This provision is contained in the present Constitution (Purdon's Penna. Statutes Annotated (permanent edition), Constitution, page 423.)

The Constitution of South Carolina of 1895 provides:

> "The militia of this state shall consist of all able bodied male citizens of the state between the ages of eighteen and forty-five years, except such persons as are now or may be exempted by the laws of the United States or this state, or who from religious scruples may be averse to bearing arms." (Thorpe, Vol. 6, page 3341.)

This provision is contained in the present Constitution (Code of Laws of South Carolina, 1922, Vol. I, page 601.)

The Constitution of Vermont of 1793 provides:

> "Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent." (Thorpe, Vol. 6, page 3763.)

This provision is contained in the present Constitution (General Laws of Vermont, 1917, page 46.)

The Constitution of Wyoming of 1889 provides:

> "The militia of the state shall consist * * * of all able-bodied male citizens of the state, between the ages of eighteen and forty-five years; except such as are exempt by the laws of the United States or of the state. But all such citizens having scruples of conscience reverse to bearing arms shall be excused therefrom upon such conditions as shall be prescribed by law." (Wyoming, Compiled Statutes, 1920, p. 63.)

APPENDIX D.

Compendium of State Militia Acts With Notations of Provisions Relating to Persons Having Conscientious Religious Scruples Against Bearing Arms.

The existing militia acts of all the States have been listed below. Those designated by (A) contain specific provisions exempting from militia duty persons having conscientious religious scruples. The statutes of eighteen States so provide. Those designated by (B) exempt from militia duty those exempted by the laws of the United States. These laws contain exemptions for persons with religious scruples. The statutes of seventeen of the States and the statute of the District of Columbia contain such a provision. Those designated by (C) contain a provision that their application must conform to the provisions found in the National Defense Acts or in federal law, which, as a matter of fact, do exempt persons with religious scruples. The statutes of eight States so provide. The five States designated by (D) make no provision in their statutes for persons having religious scruples against bearing arms. In all of these States, however, except Wisconsin, a specific exemption of such persons is made in the State constitution. In the State of Wisconsin, in fact, there is no statute requiring compulsory militia service.

(A) Alabama—Code of 1928, sec. 1600 (4).

(B) Arkansas—Crawford and Moses, Digest of 1921, ch. 119, secs. 7189-7191.

(D) Arizona—Revised Code of 1928, ch. 50, sec. 2195.

(C) California—Statutes and Code of California of 1929, ch. 47, p. 112.

(C) Colorado—Courtright's Mills Annotated Statutes of 1930, vol. 3, ch. 106, sec. 4765.

(B) Connecticut—General Statutes of 1930, ch. 42, secs. 746, 747.

(C) Delaware—Laws of 1921, ch. 8, sec. 3, p. 92.

(B) Dist. of Columbia—Code of March 4, 1929, sec. 1442, p. 288.

(A) Florida—Compiled Gen. Laws of 1927, vol. 1, sec. 2016.

(B) Georgia—Park's Annotated Code, 1922, supp., vol. 11, sec. 1467 (e), (m); pp. 498, 500.

(B) Idaho—Laws of 1927, ch. 261, pp. 513, 514.

(B) Illinois—Cahill's Revised Statutes of 1929, ch. 129, par. 1, p. 2479.

(D) Indiana—Burn's Anno. Statutes of 1926, vol. 3, ch. 80, sec. 9905.

(A) Iowa—Code of 1927, sec. 432.

(A) Kansas—Revised Statutes of 1923, ch. 48, sec. 102.

(B) Kentucky—Carroll's Statutes of 1922, sec. 2711 (a) 7.

(A) Louisiana—Wolff's Const. and Stat. of 1920, vol. 2, p. 1146, secs. 1, 3.

(A) Maine—Revised Statutes of 1930, ch. 18, sec. 3, pp. 323-24.

(A) Maryland—Bagby Anno. Code of 1924, art. 65, sec. 1, pp. 2172-73.

(A) Massachusetts—Cumulative Statutes of 1927, ch. 33, sec. 4.

(B) Michigan—Compiled Laws of 1929, vol. 1, ch. 27, sec. 629.

(A) Minnesota—Mason's Statutes of 1927, vol. 1, ch. 12, sec. 2399.

(B) Mississippi—Code of 1930, vol. 2, ch. 136, secs. 5485, 5486.

(D) Missouri—Revised Statutes of 1929, vol. 2, ch 116, sec. 13822 *et seq.*

(C) Montana—Revised Code of 1921, vol. 1, secs. 1333, 1334.

(B) Nebraska—Compiled Statutes of 1929, ch. 55, sec. 101.

(C) Nevada—Hillyer, Compiled Laws of 1929, vol. 3, sec. 7120.

(B) New Hampshire—Public Laws of 1926, vol. 1, ch. 124, sec. 15, p. 473.

(A) New Jersey—Supplement to Compiled Statutes of 1925-30, ch. 129, sec. R. 102.

(B) New Mexico—Statutes Annotated of 1929, ch. 93, sec. 102.

(B) New York—McKinney's Consolidated Laws, Book 35, 1930 Supp., sec. 1.

(A) North Carolina—Code of 1927, ch. 111, sec. 6795.
(B) North Dakota—Compiled Laws of 1913, vol. 1, ch. 35, sec. 2347, p. 568.
(A) Ohio—Throckmorton's Annotated Code of 1930, sec. 5177.
(A) Oklahoma—Compiled Statutes Annotated of 1921, vol. II, sec. 7508.
(A) Oregon—Code Annotated of 1930, vol. 3, ch. 52, sec. 105.
(B) Pennsylvania—Purdon's Statutes Annotated of 1931, Title 51, secs. 1, 2.
(A) Rhode Island—General Laws of 1923, ch. 418, sec. 6659, p. 1862.
(C) South Carolina—Laws of 1922—No. 501, sec. 5, p. 859.
(A) South Dakota—Compiled Laws of 1929, vol. 2, Part 23, sec. 10551.
(B) Tennessee—Shannon's Annotated Code of 1917, vol. 1, sec. 591, a. 1.
(A) Texas—Vernon's Annotated Statutes of 1925, vol. 17, title 94, art. 5766-67.
(B) Utah—Laws of 1917, ch. 99, sec. 1, pp. 289-290.
(D) Vermont—General Laws of 1917, ch. 256, sec. 6016.
(A) Virginia—Code of 1930 Annotated, ch. 106, sec. 2673(5).
(C) Washington—Remington's Compiled Statutes of 1922, vol. 3, sec. 8464-8465.
(C) West Virginia—Official Code of 1931, ch. 15, art. 1, sec. 4, p. 314.
(D) Wisconsin—Statutes of 1929, ch. 21, sec. 01.
(B) Wyoming—Laws of 1925, ch. 163, p. 251.

We shall qnote the statutory provisions making specific exemptions for persons having conscientious religious scruples against bearing arms.

In the State of Alabama the statute exempts,

> "all persons who, because of religious belief, shall claim exemption from military service, if the conscientious holding of such belief shall be established under such regulations as the President of the United States or the Governor of Alabama shall prescribe * * * but no person so exempted shall be exempt from militia service in any

capacity that the President of the United States or the Governor of Alabama shall declare to be non-combatant."

In the State of Florida the statute contains an exemption for,

"all persons who, because of religious belief, shall claim exemption from military service, if the conscientious holding of such belief shall be established under such regulations as the President of the United States or the Governor of Florida shall prescribe * * * but no person so exempted shall be exempt from militia service in any capacity that the President of the United States or the Governor of Florida shall declare to be non-combatant."

In the State of Iowa the provision reads:

"No person having conscientious scruples against bearing arms shall be compelled to do military duty in time of peace."

In the State of Kansas the provision reads:

"Persons exempt from military duty * * * (third), all persons who are members of any well recognized religious sect or organization at present organized and existing whose creed forbids its members to participate in war in any form, and whose religious convictions are against war or participation therein, in accordance with the creed of said religious organization."

In the State of Louisiana the statute exempts,

"all persons who because of religious beliefs shall claim exemption from militia service, if the conscientious holding of such belief shall be established, but such persons so exempted shall be required to serve in any capacity which the President of the United States shall declare to be non-combatant."

In the State of Maine the statute exempts,

"all persons who because of religious belief shall claim exemption from militia service, if the conscientious

holding of such belief by such person shall be established under such regulations as the President shall prescribe."

In the State of Maryland the statute exempts "members of religious communities".

In the State of Massachusetts the provision reads:

"Every person of the religious denomination of Quakers or Shakers conscientiously scrupulous of bearing arms shall, if such conscientious belief is established as provided by the laws of the United States, be exempt from service in the militia in a combatant capacity."

In the State of Minnesota the provision reads:

"* * * and all persons who because of religious beliefs shall claim exemption from military service if the conscientious holding of such belief by such person shall be established under such regulations as the President of the United States shall prescribe, shall be exempt from militia service in a combatant capacity; but no person so exempted shall be exempt from militia service in any capacity that the President of the United States shall declare to be non-combatant."

In the State of New Jersey the provision reads:

"All persons who because of religious belief shall claim exemption from military service in (sic) the conscientious holding of such belief by such persons shall be established, under such regulations as the President of the United States or the Governor of this State shall prescribe, shall be exempted from military service in a combatant capacity; but no person so exempted shall be exempted from militia service in any capacity that the President of the United States or the Governor of this State shall declare to be non-combatant."

In the State of North Carolina the provision reads:

"All persons who, because of religious belief, shall claim exemption from military service, if the conscientious holding of such belief by such person shall be established under such regulations as the President shall

prescribe, shall be exempted from militia service in a combatant capacity; but no person so exempted shall be exempt from militia service in any capacity that the President shall declare to be non-combatant."

In the State of Ohio the provision reads:

"All persons who because of religious belief shall claim exemption from military service, when the conscientious holding of such belief by such person shall be established under such regulations as the Governor shall prescribe, shall be exempted from military service in a combatant capacity; but no person so exempted shall be exempt from military service in any capacity that the Governor shall declare to be non-combatant."

In the State of Oklahoma the statute exempts,

"all persons who because of religious belief, shall claim exemption from military service; if the conscientious holding of such belief by such person shall be established under such regulations as may be prescribed by the President of the United States, shall be exempt from militia service in a combatant capacity."

In the State of Oregon the provision reads:

"All persons who because of religious beliefs shall, claim exemption from military service shall under such regulations as the President may prescribe be exempted from militia service in a combatant capacity."

In the State of Rhode Island the provision reads:

"such others as shall make oath or affirmation that they are conscientiously scrupulous against bearing arms, which fact shall appear by certificate of the magistrate before whom such oath or affirmation was given [are exempted]."

In the State of South Dakota the provision reads:

"The following persons are exempt from military duty: * * * (3) all persons who are members of any well recognized religious sect or organization, organized and existing prior to the first day of March, 1917, whose

creed forbids its members to participate in war in any form, and whose religious convictions are against war or participation therein, in accordance with the creed of such religious organization; * * *"

In the State of Texas the provision reads:

"In addition to those exempted by the laws of the United States the following persons shall be exempt from military duty in this State: * * * (11) any person who conscientiously scruples to bear arms; provided he shall pay an equivalent for personal service."

In the State of Virginia the provision reads:

"All persons who because of religious belief shall claim exemption from military service, if the conscientious holding of such belief by such person shall be established under such regulations as the President of the United States shall prescribe, shall be exempted from militia service in a combatant capacity; but no person so exempted shall be exempt from militia service in any capacity that the President shall declare to be noncombatant."

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SUPREME COURT OF THE UNITED STATES.

October Term, 1930.

No. 504.

UNITED STATES OF AMERICA,
Appellant,

v.

DOUGLAS CLYDE MACINTOSH,
Petitioner for Naturalization,
Appellee.

No. 505.

UNITED STATES OF AMERICA,
Appellant,

v.

MARIE AVERIL BLAND,
Petitioner for Naturalization,
Appellee.

ON CERTIORARI FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN BEHALF OF AMERICAN FRIENDS SERVICE COMMITTEE.

CHARLES P. HOWLAND,
of New York,
RICHARD W. HALE,
of Boston,
AMICI CURIAE.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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SUPREME COURT OF THE UNITED STATES

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No. 504

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No. 505

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

In the above-entitled cases the undersigned move for leave to file the accompanying brief as *amici curiae*.

The American Friends Service Committee, which we represent, is a corporation organized under the laws of the State of Pennsylvania, as a corporation of the first class, by decree of the Court of Common Pleas of Philadelphia County, No. 5, signed February 11, 1928. It is an agency of the several branches of the Religious Society of Friends in the United States. By reason of the long established principles of this Religious Society relative to the issues of war and military service, the members of the said Committee are impelled to sympathy with the applicants for citizenship whose rights are here drawn in question and

with others, both within and without membership in the said Religious Society, whose rights may be seriously affected.

All counsel have consented to our filing this brief.

CHARLES P. HOWLAND, of New York,
RICHARD W. HALE, of Boston,
As *amici curiae* and as counsel for
AMERICAN FRIENDS SERVICE COMMITTEE.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 504

THE UNITED STATES OF AMERICA
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DOUGLAS CLYDE MACINTOSH

No. 505

THE UNITED STATES OF AMERICA
v.
MARIE AVERIL BLAND

BRIEF IN BEHALF OF AMERICAN FRIENDS SERVICE COMMITTEE

Concise Statement

Professor Douglas Clyde Macintosh, a teacher of theology, and Miss Marie Averil Bland, a nurse, are applying for naturalization as persons "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Dr. Macintosh's religious beliefs would not permit him to promise in advance to bear arms in a war which he might believe was not morally justified. Miss Bland's religious beliefs forbid her to promise to bear arms in any war, because she believes war to be against the ethics of Christ. May they be admitted?

Statement of the Case

In the questions here presented, members of the Religious Society of Friends (Quakers) are keenly interested. For over two hundred and fifty years it has been a part of the religious faith of this body that all war is inconsistent with the principles of Christianity and the best interests of mankind. Although not shared by all of its individual members, this has been the official position of the Society of Friends from its inception in the seventeenth century down to the present time. The American Friends Service Committee, at present incorporated under the laws of the State of Pennsylvania, was organized in 1917 to represent all the several branches of the Society of Friends in America in connection with the emergency of the World War. Through this Committee a large number of Friends found service in various forms of civilian relief work in many countries of Europe. In France and Belgium, between the years 1917 and 1920, this Committee operated as a unit of the American Red Cross, and during the years 1920 to 1924 the Committee carried on a large program of child feeding in Germany as an agency of the American Relief Administration. The Committee still continues to function as a channel through which the members of the Society of Friends and other persons of congenial spirit can serve their fellow men.

It is interested in the question now pending before this Court for the reason that several members of the religious body which it represents, citizens of other countries, have been denied citizenship in this country because of their conscientious inability to take oath or affirmation promising to engage in military activities. The interest of Friends in this question extends beyond the problem as presented for its own members. Sincerity of religious conviction is

not dependent upon membership in any particular religious sect, and the solemn question presented in this proceeding is the same for all persons, regardless of such affiliation.

Persons of deep religious conviction earnestly desire to "render unto Caesar the things that are Caesar's, and unto God the things that are God's." To the men and women of this body of citizens Christ's maxim presents a threefold problem: (1) What is the duty to God? (2) What is the duty to the Civil Authority? (3) How can these duties be harmonized? Treason is a great wickedness, but not less awful is breach of faith with Jehovah.

We believe that our clients could properly disassociate themselves from Rosika Schwimmer;[2] her position as an applicant for naturalization will be fully considered in the other briefs and compared with that of Miss Bland and Dr. Macintosh. Madame Schwimmer would not render to Caesar, for she had "no sense of nationalism,[3] only a cosmic consciousness of belonging to the human family." Nor did she acknowledge a duty to God, for she declared that she was an "absolute atheist." Professor Macintosh, Miss Bland, and those who have a fellowship with them base that fellowship upon a unity of feeling diametrically opposed to Madame Schwimmer, because they patriotically acknowledge one duty and reverently insist upon the other. To use the language of the Schwimmer case, neither of these applicants shows any disposition to oppose the organization of a "common defense" of the United States, or to exert a "power to influence others to such opposition," or to encourage others in a refusal to bear arms. There is

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[2] 279 U.S. 644.

[3] We must suppose she meant "nationality," or sense of what a nation is.

in them no trace of a rebellious spirit; their scruples relate only to personal combatant service.

The two petitioners present records to this Court which prove them to be outstanding in character, intelligence, willingness to serve and sacrifice, and in regard for their civic duties. We contend that they and Friends and other virtuous like-minded men and women are admissible as citizens under a proper interpretation of the naturalization oath, construed in the light of American historical precedents.

Dr. Douglas Clyde Macintosh is a Baptist, and a professor in the Yale Divinity School; he has a record of service at the front in the World War as a chaplain with the Canadian and American armies. He was willing to take the oath of allegiance (Record, p. 5, answer to Q. 20, and p. 12, *19). Asked if he was willing to take up arms in defense of this country, he answered, "Yes, but I should want to be free to judge of the necessity" (p. 5, answer to Q. 22).

At the hearing before Judge Burrows Dr. Macintosh testified that he was not a pacifist, and would interpret and take the oath as not inconsistent with his position. In his opinion his first allegiance was to the will of God, defined as what was morally right and for the ultimate well-being of humanity, and after that he would put allegiance to one's country, as coming before all private interest. He was ready to give to the United States all the allegiance he could give to any country, but he could not put allegiance to the government of any country before allegiance to the will of God.[4] The international outlook he favored would not mean the doing away with nationality. He is not a propagandist (Record, pp. 12, 13, *20, *21).

[4] Like the 17th Century Friend, "refusing not in contempt of the King or any of his officers, but in obedience to the Lord, who had showed him mercy." Hirst, p. 76.

The Government position in the lower courts has been that the naturalization laws required an "unqualified oath," *i.e.*, that the man or woman swearing must not ask any individual right to harmonize his duties to State and to conscience.

Judge Burrows, adopting the Government view, found that Dr. Macintosh was "not attached to the principles of the Constitution of the United States," because

> considering his allegiance to be first to the will of God, (he) would not promise in advance to bear arms in defense of the United States under all circumstances but only if he believed the war to be morally justified.
>
> Decree, p. 16, *27.

Marie Averil Bland is an Episcopalian; her father is an Episcopal minister, with a church in Lincolnshire, England. For nine months after the armistice she nursed shell-shocked soldiers in the psychiatric department at Brest, France, as a member of the reconstruction unit of the United States Government.

Construing the naturalization oath as containing a promise to bear arms, she was unwilling to take it, believing that the bearing of arms is contrary to the ethics of Christ; her own interpretation of the gospel preached in the Episcopal Church is opposition to war. Nevertheless, in time of war she would render service to the Government in any capacity but that of a combatant, and would be willing to help the wounded anywhere (Record, p. 9, *18). She would not proselytize or try to induce others to accept her views and beliefs (Record, p. 10, *19).

Judge Bondy put this devout churchwoman in the same category with Madame Rosika Schwimmer, "absolute atheist," possessing "no sense of nationalism," and propa-

gandist of her opinions, and denied Miss Bland's application.

Argument

The holding of the Court in these cases will be a national shibboleth. Loyalty and support and defense of Constitution and laws must in the nature of the case be uniform throughout the United States. Wherever process runs, laws are to be obeyed, and oaths to be taken. Naturalization will play a minor role in a survey of the whole field of allegiance to that Supreme Temporal Being, the Sovereign Nation.

The Government says that the oath and obligation of allegiance are "unqualified," and means and contends that our nation, instead of desiring thinking citizens, demands unqualified subjection, so that the "majority" of the "people" shall rule in all spheres and on all issues.[5] No exception is allowed to the rigorous sovereignty of the State.

The premise assumed by this view has long been discussed and expounded by political philosophers. It came to prevail in Prussia early in the 19th century and from Prussia spread to the rest of Germany. Hegel developed it. Treitschke discussed it generally. Bismarck applied it to internal and external politics and von Bernhardi used it to glorify aggressive war. To this Prussian concept and its applications the English and American ideas of liberty and the practices of democratic governments are in complete opposition, and the antagonism of ideas and of practices was one aspect of the World War.

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[5] Was it of this "majority" that William Ellery Channing was thinking when he said "multitudes never blush"?

The Prussian philosophy of the State had its roots in a national experience. The efforts of Stein and Gneisenau to create a corporate sense of unity in the German people as a means of throwing off the yoke of Napoleon called for a complement in the sphere of political philosophy. This appropriate metaphysical concept Hegel produced. The end-product of his thinking about the State was that it is absolute, ultimate, and universal—a moral Absolute. The individual must adjust himself to it, and from his relation to it draw his meaning and his being. Partaking of the attributes of Divinity, Hegel's State could not be called to any moral account, whether by other States or by its own subjects. There are therefore no free citizens.

> The State is the realized ethical idea. . . . . This substantive unity is its own motive and absolute end. . . . This end has the highest right over the individual, whose highest duty in turn is to be a member of the State.[6]
>
> The State is the march of God in the world; its ground or cause is the power of reason realizing itself as will. When thinking of the idea of the State, we must not have in our mind any particular State, or particular institution, but must rather contemplate the idea, this actual God, by itself.[7]

The idea incubated by Hegel passed through the forcing house of Treitschke, "the Bismarck of the Chair," who gave it unphilosophic and dogmatic expression. Treitschke exalted the moral and spiritual grandeur of power. The State has no obligation to obtain for its actions the approval of its subjects; power alone suffices it. "Empires have existed for centuries as powerful and highly developed States without this internal acquiescence of their citizens.

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[6] Hegel, *Philosophy of Right*, translated by S. W. Dyde (London, 1896), p. 240.
[7] *Id.* p. 247.

What the State demands above all is action in its most external form. . . . *Its essence is to realize what it wishes.*"[8]

Treitschke's audiences heard him expound the terrible text βία βίᾳ βιάζηται (force is controlled and generated by force), a principle, he said, which dominates all the history of States and commands the illimitable obedience of every subject in every sphere. "It is of the very essence of the State that it cannot recognize any force above itself."[1] "Apart from the State, humanity cannot breathe."[2]

The duty of the citizen, therefore, is to surrender his conscience into the keeping of the State. As war is one of its functions, in the discharge of which all citizens owe it allegiance, the State makes the choice of means, and, the choice once made, all citizens (subjects) must dutifully assist, however wicked they, if they had free minds, might think those means to be. The system would tolerate no protest against the invasion of Belgium, and none against waging some future war with gas and bacterial poison, too horrible to contemplate.

The correlative of the dominating State, asserting its will over the promptings of the individual's conscience, is the docility of the herd. Bismarck encouraged it that his policies might meet with no domestic resistance; Bernhardi developed it in order to provide the necessary supply of submissive soldiers for the German armies. He believed that "the assertion of the rights of the individual leads ultimately to individual irresponsibility and to a repudiation of the State."[3]

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[8] *Die Politik* (2d ed. Leipzig, 1899-1900), I, 33.
[1] *Id.* I, 371.
[2] *Id.* I, 115.
[3] *Germany and the Next War*, translated by A. H. Powles (1st ed. 1914), p. 63.

The Government position in these cases is that the willingness to bear arms must be "unqualified." The "unqualified oath" is an inexorable major premise of a deductive logic which drives forward to a conclusion. The voice we are quoting is the voice of the learned Assistant District Attorney who argued the Macintosh case in the Circuit Court of Appeals, but the hand is the Iron Hand of Prussian history.

English-speaking folk have no such political metaphysics. Hobbes made no lasting impression on them with his "Leviathan," and the evolution of their practice goes directly counter to the Austinian theory.[4] They approach the relations of human beings with each other in municipal law, in the organization of the town meeting, or in the framing of States, from a pragmatic point of view, testing the value of principles and institutions by their permanent fruits alone. The question is always, Does the thing work? The point of view is that of finding practical solutions for actual problems. One is found. A second problem arises and is similarly solved. In the increasing complexities of government these problems and their solutions come into relations with each other, and from these relations emerges the pattern of English and American institutions.

In that pattern, which can scarcely be called a system, "acts which touch us nearly are dependent for their validity upon the consent they can secure." This is the nourishing ideal of Anglo-Saxon liberty. Santayana has put it compactly:

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[4] "The whole school of Hobbes and Bentham and Austin . . . interpret sovereignty as an extreme master-servant relationship, but their account is far more applicable to a slave-plantation or to a menagerie than to the actuality of political life." MacIver, *The Modern State* (Oxford, 1926), p. 14.

> The apologists of absolute will are not slow, for instance, to tell us that Germany in her laborious ambitions has been pursuing the highest form of freedom, which can be attained only by organizing all the resources of the world, and the souls of all subsidiary nations, around one luminous centre of direction and self-consciousness, such as the Prussian government was eminently fitted to furnish. Freedom to exercise absolute will methodically seems to them much better than English liberty, because it knows what it wants, pursues it intelligently, and does not rely for success upon some measure of goodness in mankind at large. English liberty is so trustful! It moves by a series of checks, mutual concessions, and limited satisfactions; it counts on chivalry, sportsmanship, brotherly love, and on that rarest and least lucrative of virtues, fair-mindedness: it is a broad-based, stupid, blind adventure, groping towards an unknown goal. Who but an Englishman would think of such a thing![5]

These liberal practices do not weaken the State, as the Prussian school believed; they are the best safeguard of the State against subversive change, averting the natural desire of any spirited people "to fly in the face of such usurped authority, and do with ostentation the exact opposite of what it enjoins."[6] There is shrewd statecraft in Jefferson's dictum that it is better to "be exposed to the inconveniences attending too much liberty than those attending too small a degree of it."[7]

The theory of an authorization by the citizen of all possible future acts of government is destructive of the springs of individual morality. The truly loyal resist such claims stoutly, since they are loyal from conviction, and convic-

[5] *Character and Opinion in the United States* (New York, 1920), pp. 215, 216.
[6] Mill on Liberty, c. IV.
[7] Letter of December 23, 1791, to Mr. Stuart, *Works*, vol. III, p. 314.

tion cannot be bound in advance. The ultimate source of law-abidingness is the respect of citizens for the law, and respect for law—a thing so precious that it should be nourished by all possible measures and modes—depends in large extent on the respect which law itself exhibits towards the foundations of that respect—the convictions of the citizens. It is therefore wiser to accept the risk that some in obeying their convictions may disobey the law, than to make the conditions of obedience mechanical in defiance of conscience. Who can be satisfied with the spirit of law-abidingness in our present society? To strengthen it may be the most important task of Government, but Government cannot strengthen it by doing violence to the conscience of the best of its citizens.

It is not so much a superior excellence which has given the European races the lead over the Asiatics as a greater diversity in character and opinion. Emerson's epigram that "the law is only a memorandum" means the same as James Russell Lowell's:

> All free governments, whatever their name, are in reality governments by public opinion, and it is on the quality of this opinion that their prosperity depends.[8]

The freedom of spirit which informs English and American institutions, and by which the best citizens have always determined their duty, has never yielded itself unqualifiedly to Government in time of war. The good citizen must recognize expediencies, observe moderation, avoid subversive acts and propaganda, perhaps submit to penalties—but the peremptory voice of a true conscience against the evils of a war has always had a hearing. When full and calm judgment is passed upon the worth of a citizen,

[8] *Works* (Riverside ed. 1890), VI, 34, Lowell.

the measure of that worth is not his acquiescence in the wisdom of a declaration of war, still less his willingness to kill in a war against which his conscience revolts—no such crude measure—but rather the quality of his attachment to the spirit and the institutions of the Government under which he lives.

To free minds Charles James Fox was a better citizen of England, from the point of view of English interests, than Lord North. Yet after the war had begun in America Fox would not vote supply for "so ignoble a purpose as the carrying on a war commenced unjustly, and supported with no other view than to the extirpation of freedom."[9] And after Saratoga he asked Lord George Germain in the House "what he now thought of Mr. Washington, whom he had esteemed so lightly, in view of the tidings at the moment before them?"[1]

In this attitude Fox was no eccentric. With him stood Burke, Barré, Camden, the Earl of Effingham, the Duke of Richmond, the Marquis of Rockingham, Adam Smith, Coke of Norfolk, who would "clog the wheels of government" rather than support Lord North,—and all their Whig associates who refused to support the war because they thought it oppressive and wicked, and likely to be disastrous for Great Britain however victory might go.

When Congress declared war with Mexico on May 13, 1846, the Legislature of Massachusetts did not wait for the verdict of history to declare it unjust, but

> Resolved. That such a war of conquest so hateful in its objects, so wanton, unjust and unconstitutional in its origin and character, must be regarded as a war against freedom, against humanity, against justice, against the

[9] John Drinkwater, *Life of Charles James Fox* (New York, 1928), p. 140 (April or May, 1776).
[1] *Id.* p. 165.

> Union, against the Constitution and against the free states; and that a regard for the true interests and highest honor of the country not less than the impulses of Christian duty should arouse all good citizens to join in efforts to avert this war. . . .[2]

Suppose that one of these legislators on re-election had been denied the right to take the "unqualified oath" which is required by the United States Constitution, VI, 3. Would that have accorded with the common sense of American politics?

William Jay denounced the war as one of invasion and conquest, based upon the "profligate and impious sentiment, 'my country right or wrong.'"[3] Theodore Parker declared it was no treason to discuss the war the people have got to fight and pay for.[4]

Charles Sumner, whose attachment to the Constitution was profound, felt no obligation to support an administration's war. In the Tremont Temple, Boston, November 4, 1846, he said:

> It is a war base in its object, atrocious in its beginning, immoral in all its influences and vainly prodigal of treasure and life. It is a war of infamy, destined to blot the pages of our history with incredible blackness. No success, no bravery, no victory can change its character.[5]

Sumner approved the act of Fox in refusing to vote supply for the war with America. This he conceived to be the straight line of conduct to be observed by a Member of

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[2] Massachusetts Acts and Resolves 1847, p. 541, c. 103 of Resolves.
[3] Jesse Lee Bennett, *The Essential American Tradition* (N.Y. 1925), p. 308.
[4] *Id.* p. 201.
[5] *Orations and Speeches* (edition of 1850), II, 148.

Parliament. In Faneuil Hall February 4, 1847, he attacked the argument that, the war having been begun, it must be assisted by all.

> In what book of morals is it written, that what is bad before it is commenced, may become righteous merely by the fact that it has been commenced? Who on earth is authorized to transmute wrong into right?[6]

Many public men were far less temperate while the Mexican War was waging than Dr. Macintosh would ever be. Lowell's fire was not veiled by his satire.

> Ef you take a sword an' dror it,
> An' go stick a feller thru,
> Guv'ment aint to answer for it,
> God'll send the bill to you.[7]

The biting "John P. Robinson" verses appeared in November, 1847, and later, Lowell published this slaughter bill:

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[6] *Id.* II, 186.
[7] *The Biglow Papers* (Riverside ed. June, 1846), vol. I, p. 55.

WASHINGTON,
Sept. 30, 1848.

Rev. HOMER WILBUR to **Uncle Samuel**, Dr.

To his share of work done in Mexico on partnership account, sundry jobs, as below.

" killing, maiming, and wounding about 5,000 Mexicans	$2.00
" slaughtering one woman carrying water to wounded	.10
" extra work on two different Sabbaths (one bombardment and one assault) whereby the Mexicans were prevented from defiling themselves with the idolatries of high mass	3.50
" throwing an especially fortunate and Protestant bombshell into the Cathedral at Vera Cruz, whereby several female Papists were slain at the altar	.50
" his proportion of cash paid for conquered territory	1.75
Do. do. for conquering do	1.50
" Manuring do. with new superior compost called "American Citizen"	.50
" extending the area of freedom and Protestantism	.01
" glory	.01
	$9.87

Immediate payment is requested.

N. B. Thankful for former favors, U. S. requests a continuance of patronage.

Orders executed with neatness and despatch.

Terms as low as those of any other contractor for the same kind and style of work.[8]

[8] *Id.* p. 160.

The man who thus denounced the war during its course was neither deprived of his citizenship on the ground that he would not "support and defend the Constitution," nor proscribed by the Government or the community. He was honored as a great American citizen, and took the oath as our Envoy at the Court of St. James's.

The next war in conflict with the consciences of good citizens was the Crimean War, declared by Great Britain in 1854. John Bright was not an opponent of the principle of "common defense"; he never condemned all national use of arms, and when the time came he supported the forcible suppression of the Indian mutiny and the cause of the American North against secession. His position was that of Fox, Sumner, Lowell, and of Dr. Macintosh, and not that of Madame Schwimmer. On November 3, 1854, Bright published in the *Times* his celebrated letter addressed to Mr. Absalom Watkin, denouncing the injustice of the war, which he called "this murderous warfare with Russia."[9]

> . . . Russians in their frenzy or their terror shooting Englishmen who would have offered them water to quench their agony of thirst; Englishmen, in crowds, rifling the pockets of the men they had slain or wounded, taking their few shillings or roubles, and discovering among the plunder of the stiffening corpses images of the 'Virgin and the Child.' You have read this, and your imagination has followed the fearful details. This is war—every crime which human nature can commit or imagine; every horror it can perpetrate or suffer; and this it is which our Christian Government recklessly plunges into, and which so many of our countrymen at this moment think it patriotic to applaud! You must excuse me if I cannot go with

[9] George Macaulay Trevelyan, *John Bright* (Boston, 1913), p. 220.

> you. I will have no part in this terrible crime. My hands shall be unstained with the blood which is being shed.[1]

When Dr. Macintosh considers his duty to God he does not need John Bright's imagination to picture the horrors of war—he has seen them with his own eyes!—and he weighs the awful burden that would lie upon his conscience if his hands should be stained in a war he believed to be unjust.

If Bright, not Macintosh, were here an applicant for naturalization, and "the Government" were opposing him, one of the witnesses to his "attachment to the principles of the Constitution" would be Abraham Lincoln. Lincoln issued a pardon to an English boy of twenty who had been sentenced to imprisonment and fine for plotting to seize a vessel in San Francisco Bay and send her out as a Confederate privateer (or pirate). The pardon read:

> . . . And whereas, the said Alfred Rubery is a subject of Great Britain, and his pardon is desired by John Bright, of England;
>
> Now therefore, be it known that I, Abraham Lincoln, President of the United States of America, these and divers other considerations me thereunto moving, and especially as a public mark of the esteem held by the United States of America for the high character and steady friendship of the said John Bright, do hereby grant a pardon to the said Alfred Rubery, etc.[2]

Richard Cobden's attitude also was that of Macintosh: "Under certain circumstances he would fight or, if he could not fight, he would work in the hospitals."[3]

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[1] *Id.* p. 227.
[2] *Id.* p. 296.
[3] John Morley, *Life of Cobden* (Eversley ed. 1908), II, 128.

For this independence and courage, says John Morley,

> our heartfelt admiration and gratitude goes out to Bright and Cobden, as it goes out to Burke for his lofty and manful protests against the war with America and the oppression of Ireland, and to Charles Fox for his bold and strenuous resistance to the war with the first French Republic.[4]

When Bright died in 1889, Gladstone, who had listened to him in the House in 1854 "in deep and apparent distress," pronounced his eulogy, saying of Bright and Cobden:

> We had not till then known how high the moral tone of these popular leaders had been elevated, and we had not known of the splendid examples they could set to the whole of their contemporaries, and to coming generations, of a readiness to part with all the sympathies and with all the support they had held so dear for the sake of right and conscientious conviction.[5]

The list might be indefinitely extended. The names on it are universally held in honor. How does the Solicitor-General explain this? If those persons were unfit material for the citizenship of a self-governing Commonwealth, little is left of our traditions and of our belief that we are citizens and not subjects.

What bearing has the philosophy of history upon the cases at bar? In performing what judicial function may this Court take account of these contrasting ideas? In the function, we submit, of construing the requirements

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[4] *Id.* 128.

[5] George Macaulay Trevelyan, *John Bright, op. cit.* p. 216.

for naturalization set forth in the Act of 1906, including the prescribed oath, and of aligning those requirements with the American practice of liberty of conscience.

When we examine the language of the Act and the oath, and look into the history of that language, it is clear, we submit, that Congress had no intention of altering immemorial American practice in order to set up a Prussian *Philosophie des Staatsrechts.*

In the Naturalization Act of 1906 Congress has prescribed that an applicant for citizenship must be attached to the principles of the Constitution. He must therefore accept the constitutional principles and system which he finds here: the system of "common defence," under which Congress may exercise any of the powers entrusted to it by section 8 of the First Article, and may not infringe "the right of the people to keep and bear arms." These are essential elements of the scheme of things to which the applicant must give his allegiance, and this is the Constitution to which he must declare his attachment.

Neither appellee is an enemy of this system, as was Madame Schwimmer. Miss Bland asks the Court whether Congress, under the Constitution, has required her to call God to witness that her service in the next war shall be with gun and sword. Professor Macintosh asks if he must invoke the Deity to witness a wholly unconditional surrender of his religious belief.

If the petitioner is not opposed to the constitutional provisions for military and naval defense, but accepts and is therefore attached to the principles of the Constitution, as both these appellees declare themselves to be, does the prescribed oath require them to surrender their scruples and to agree at any and all times to go into the army and to kill other human beings? The oath is "to support and

defend the Constitution and laws of the United States."[6] It will be observed that the language is figurative. Military force, an army and navy, is necessarily involved in "defending" the territory of a country against invasion, the person of a king against violence or rebellion. But a country's Constitution and laws are not in issue in its wars, nor is it necessary that the country be at war for the Constitution and laws to need the support and defense of good citizens. In many ways will good citizens support, defend, protect, cherish, shield, and vindicate the principles of the Constitution. All such synonyms express loyalty and allegiance; they have no military connotation.

This rational meaning of the words of the oath is congruous with their origin and use, in which there is nothing to suggest an element of personal military service. The phraseology and history of the oath administered under the Naturalization Act are material and we deal with them in detail in Appendix A, p. 27. The Court will find the notion of an unqualified oath illuminated in a passage of Macaulay showing how Englishmen felt when Danby proposed enacting it into law (*infra*, p. 28). The story of the various oaths may be summed up: Loyalty is the end sought; subjection in all matters temporal and religious has not in fact been in the minds of those who have written the oaths. In our appendix we review the oaths of 1789, of the Civil War, of the reconstruction period. American equally with English draftsmanship has had in the forefront of its mind God and Country rather than the god of battle.

Under the Constitution the President must swear *or affirm* to "preserve, protect and defend the Constitution of

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[6] Act of June 29, 1906; 34 Stat. 596; 8 U.S. Code, title 8, §381 (U.S. C.A. 381).

the United States."[9] Washington, who took the oath, considered the non-fighting Quakers to be good patriots. Discussing them with a French visitor, he declared that "in the course of the war he had entertained an ill opinion of this Society; he knew but little of them, as at that time there were but few of that sect in Virginia, and he had attributed to their political sentiments the effect of their religious principles. He told me that having since known them better he acquired an esteem for them; and that, considering the simplicity of their manners, the purity of their morals, their exemplary economy, *and their attachment to the constitution*, he considered this Society as one of the best supports of the new Government."[1]

The Act of 1906 itself,[2] in the form given for the petition for naturalization, requires only that the applicant state that he is "attached to the principles of the Constitution,"[1] and it is to this "attachment" only that the witnesses are to swear.[2] It would seem apparent, therefore, that the purpose of the oath in the Naturalization Act was merely to secure a further guarantee of this characteristic, and, in the words of the Virginia Act of Naturalization of 1783, "to keep the offices of the government in the hands of citizens

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[9] Constitution of the United States, Art. II, sec. 1, at end.

[1] Brissot de Warville, *New Travels in America* (English ed. 1794), p. 357, quoted in M. E. Hirst, *op. cit.* p. 415.

[2] The first Naturalization Act was approved March 26, 1790 (1 Stat. 103) and called for good character and "the oath or affirmation required by law to support the Constitution." The next, in 1795, and all following to and including the existing Act of 1906, contain *the requirement* that the Court should be satisfied "that the applicant has behaved as a man of good moral character, attached to the principles of the United States, and well disposed to the good order and happiness of the same" (Act of Jan. 29, 1795; 1 Stat. 414). For subsequent statutes until 1906 see J. B. Moore, III *Digest of International Law*, sec. 381.

[1] 34 Stat. 596, sec. 27.

[2] *Id.* sec. 4 (4).

intimately acquainted with the spirit of the Constitution and the genius of the people."[3] The assertion that "support and defend the Constitution and laws" means "defend the Constitution and laws by bearing arms in any war in which the United States may be engaged" can be explained only as a belated reaction to our latest war. The oath has had no such meaning throughout its long history, nor was any such meaning contemplated in 1906 when the Naturalization Act was passed. We submit that Dr. Macintosh's and Miss Bland's interpretation of the oath which they were willing to take conformed to the intention of Congress in imposing it.

But we are told by Examiner Muller and by Judge Bondy—at least, one would so gather their intendment (Record, p. 9, *16, p. 17, *32)—that as no doctrine of the Baptist Church and as none of the Episcopalian Thirty-Nine Articles forbids the bearing of arms, neither Dr. Macintosh nor Miss Bland is actuated by religious scruple.[4] This is to say that nothing is religious until it is codified, as silver is not lawful until it is hallmarked; and it would also limit the privilege of conscience to those who are enlisted in some regiment of men who think with them.

We reply with the answer given by Mr. Justice Field to such a suggestion in *Davis* v. *Beason*, 133 U.S. 333, 342:

> The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter.

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[3] Act of 1783; p. 57.

[4] We may remark that this argument abandons the unconditional obedience theory; if religious scruple is to be found in some canon or ineluctable dogma, then the oath is already "qualified."

This is only to repeat Article 16 of the Virginia Bill of Rights:

> That religion or the duty which we owe to our Creator and the manner of discharging it can only be directed by reason and conviction . . . and that it is the mutual duty of all to practice Christian forbearance, love and charity toward each other.

There is no duty in Christian ethics so profound as obedience to conscience. Judge Manton took religion in its true sense when he spoke of those "citizens who conscientiously, irrespective of sect, want to be relieved because of religious convictions against combatant military service."[5] The conscientious objectors in England during the World War were rigorously tested, and out of five thousand cases less than one hundred were rejected for insincerity.[6] The genuine cases were not confined to Quakers or to pacifist sects, but were distributed through all denominations, as appears by these percentages:[7]

Friends	14.
Congregational	12.25
Agnostics and atheists	12.
Church of England	7.50
Wesleyan	7.50
Unitarians	6.50
Jews	6.
Catholics	3.
Primitive Methodists	3.75
	71.50
Scattering	28.50

[5] *Bland* v. *The United States*, 42 Fed. Rep. (2d series) 842, 844.
[6] Margaret Heyworth Hobhouse, *I appeal unto Caesar*, p. 74.
[7] W. C. Allen, *War* (Phila. 1929), p. 116.

And so we submit that Congress did not intend to punish men for reasonable respect to spiritual obligations. The demand for an oath or affirmation presupposes the existence of a conscience and cannot be reconciled with a denial of the privilege of obeying that conscience. This Court should not declare the oath or affirmation to mean "I promise to render unto Caesar the things which are God's."

Respectfully submitted,
CHARLES P. HOWLAND,
RICHARD W. HALE.

APPENDIX A

Oaths of Allegiance in English and American History

In support of our contention that the rational meaning of the words of the oath is consonant with their origin, we offer this brief record from the statute books. We think it proves that the oaths were concocted by pragmatic men who were thinking about substantial loyalty and not about a precisely military obligation.

The phraseology of the oath administered under the Naturalization Act goes back to the renunciation of Catholicism in England under Henry VIII and Queen Elizabeth. By the Act of Supremacy in 1534[7] (re-enacted in 1558)[8] an oath was enacted "to bear true faith and allegiance to the King's Highness, his heirs and lawful successors," and "to assist and defend all jurisdiction, privileges, preeminence and authority granted." This "Oath of Supremacy" was not a promise to bear arms; it was primarily directed against the asserted power of the Pope, and was exacted of ecclesiastical and civil as well as of military officers.[1] Later, in 1562, it was taken by "all persons taking orders, schoolmasters, all persons taking any degree of learning in the Inns of Court of Chancery, all attorneys, prothonotaries, philizers, sheriffs, escheators, feodaries, all persons admitted to any ministry or office belonging to the Common Law, or other law or laws, and all officers and ministers of every court," as well as to members of the House of Commons, and every one elected or appointed a knight, citizen, burgess, or baron for any parliament.[2] Under James I an

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[7] 26 Hen. VIII, c. 1 (1534).
[8] 1 Eliz. 1 (1558).
[1] *Supra*, note 8, above.
[2] 5 Eliz. 1 (1562).

oath of allegiance to the king as temporal sovereign was required of "popish recusants,"[3] and of "all holding office of judicature or other office," or admitted "to the practice of the common law, physick, chirurgery, the art of apothecary, or any liberal science for gain,"[4] and of all persons naturalized.[5] This oath also included a promise to bear true faith and allegiance to the king, and to "defend" him "against all conspiracies and attempts."[6] Both the Oath of Supremacy and the Oath of Allegiance were exacted by Charles II of "all persons that shall bear office, civil or military, or receive any salary or wages, by any grant from the King, or shall have any command or place of trust from or under him,"[7] and of members of the House of Peers and House of Commons,"[8] and of those desiring to become citizens who were born of British parents outside of England.[9] Conservatism was carried to extravagance by the Earl of Danby in 1675 in a bill which provided that "no person should hold any office, or sit in either House of Parliament, without first declaring that he considered resistance to the kingly power as in all cases criminal, and that he never would endeavor to alter the government either in Church or State."[1] But such an infringement on the liberties of Englishmen made so much excitement that the bill had to be dropped.

In America the colonial States generally required the oaths of their citizens to "bear true allegiance" to the par-

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[3] 3 Ja. I, c. 4 (1605).
[4] 7 Ja. I, c. 6 (1609).
[5] 7 Ja. I, c. 2 (1609).
[6] *Supra*, note 2, above.
[7] 25 Car. II, c. 2 (1672).
[8] 30 Car. II, c. 1, Stat. 2 (1678).
[9] 29 Car. II, c. 6 (1677).
[1] Macaulay, *History of England* (Harper ed. of 1849), vol. 1, c. II, p. 610.

ticular State.[2] To counteract this derogation of British sovereignty, the English oaths of Allegiance and Supremacy were to some extent also administered in colonial America.[3] In 1776 the Continental Congress agreed upon an oath to be taken by officers in the service of the Congress; this oath concluded with the promise to "support, maintain, and defend the said United States against the said King George III."[4] Since the oath was specifically to be administered to military officers, it might be argued that "defend," in this instance, had a literal meaning, but this is countered by two facts. The first is that the United States can be defended in the military sense, while Constitutions and laws can not. The second fact is that when the Congress in 1777 created the civil offices of Secretary to the Committee of Foreign Affairs,[5] Secretary to the Congress, and assistant clerks and secretaries,[6] it required them to take the oath of 1776, as well as an oath to perform their offices faithfully. The obligation of military men to fight comes not from this general oath of allegiance, but from the nature of their professional engagement; it is not likely that the Congress intended its own secretary to go to war. The oath was a guarantee of loyalty and aid in general to the American States, as opposed to loyalty and aid to George III.

The later history of the words in America shows the generality of their import. A proposal under the Articles of Confederation to require an oath to support the Federal Government was defeated because this was thought to con-

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[2] Report of Committee on Naturalization of 1905, Appendix A.

[3] See Charles Evans, *Oaths of Allegiance in Colonial New England* (1922), 410.

[4] II Journals of the Continental Congress, 400.

[5] *Id.* 113.

[6] III, *Id.* 75.

flict with oaths to State Governments.[7] In the Constitutional Convention of 1787, however, the motion that the legislative, executive, and judiciary officers within the several States and of the National Government ought to be bound by oath to support the articles of union was passed unanimously.[8] The real issue was Federal, as against State, allegiance. The question of defense by force of arms was not discussed in connection with the oath.

From 1789 until the Civil War the oath required by Article VI of the Constitution for induction into other offices than the Presidency contained only the promise to "support the Constitution of the United States."[2] When the word "defend" was added in 1861, the oath, "to support, protect, and defend the Constitution and government of the United States,"[3] was to be administered to all in the civil service of the United States,[4] and was evidently designed to express the paramount authority of the National Government as opposed to State allegiance.[5]

The Act of July 2, 1862, introduced the famous "Test Oath," to be taken by everyone "elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military or naval departments of the public service, excepting the President of the United States."[6] The promise in this Test Oath to "support and defend the Constitution of the United States" was in reinforcement of the denial of having in any way

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[7] I Elliot's *Debates*, 116.
[8] *Id.* 246.
[2] Act of June 1, 1789; 1 Stat. 23.
[3] Act of August 6, 1861; 12 Stat. 326.
[4] *Id.*
[5] See Sprague, J., in "Charge to the Grand Jury," 30 Fed. Cas. 1049.
[6] Act of July 2, 1862; 12 Stat. 502.

aided the Confederacy,[7] and a further guarantee of Federal as opposed to State allegiance; it was to be taken by civil as well as military officers, and had nothing to do with bearing arms. It was, in short, intended to bar Robert E. Lee, Robert Toombs, and Jefferson Davis from citizenship in the Union, but the citizenship of James Russell Lowell, Charles Sumner, or a North Carolina Quaker or Mennonite was untouched.

In 1884 the present oath of office, including the promise "to support and defend the Constitution" was substituted for the Test Oath.[8] Is it reasonable to assume that Congress intended by these words that all civil as well as military officers of the United States should, *as a condition of taking office*, promise to join the combatant forces in wartime? The irrelevancy of such a requirement is sufficient argument that it was not imposed.

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[7] *Id.*

[8] Act of May 13, 1884; 23 Stat. 22; 5 U.S. Code, title 5, §16.

SUPREME COURT OF THE UNITED STATES.

No. 504.—October Term, 1930.

The United States, Petitioner, *vs.* Douglas Clyde Macintosh.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 25, 1931.]

Mr. Justice Sutherland delivered the opinion of the Court.

The respondent was born in the Dominion of Canada. He came to the United States in 1916, and in 1925 declared his intention to become a citizen. His petition for naturalization was presented to the federal district court for Connecticut, and that court, after hearing and consideration, denied the application upon the ground that, since petitioner would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified, he was not attached to the principles of the Constitution. The Circuit Court of Appeals reversed the decree and directed the district court to admit respondent to citizenship. 42 F. (2d) 845.

The Naturalization Act, § 4, c. 3592, 34 Stat. 596 (U. S. C., Title 8, § 372 *et seq.*), provides that an alien may be admitted to citizenship in the manner therein provided and not otherwise. By § 3 of the same act, jurisdiction to naturalize aliens is conferred upon the district courts of the United States and other enumerated courts of record. U. S. C., Title 8, § 357. The applicant is required to make and file a preliminary declaration in writing setting forth, among other things, his intention to become a citizen of the United States and to renounce all allegiance to any foreign prince, etc. Section 4 of the act (U. S. C., Title 8, §§ 381, 382) provides:

"Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, po-

tentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

"Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, . . ."

Section 9 of the act, 34 Stat. 599 (U. S. C., Title 8, § 398), requires that every final hearing upon a petition for naturalization shall be had in open court; that every final order upon the petition shall be under the hand of the court; and that "upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court." By § 11, 34 Stat. 599 (U. S. C., Title 8, § 399), it is provided that the United States shall have the right to appear in the proceeding for the purpose of cross-examining the petitioner and witnesses produced in support of the petition "concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings."

By the petition for naturalization a case is presented for the exercise of the judicial power under the Constitution, to which the United States is a proper, and always a possible, adverse party. *Tutun* v. *United States*, 270 U. S. 568, 576-577.

Naturalization is a privilege, to be given, qualified or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes. That Congress regarded the admission to citizenship as a serious matter is apparent from the conditions and precautions with which it carefully surrounded the subject. Thus, among other provisions, it is required that the applicant not only shall reside continuously within the United States for a period of at

least five years immediately preceding his application, but shall make a preliminary declaration of his intention to become a citizen at least two years prior to his admission. He must produce the testimony of witnesses as to the facts of residence, moral character and attachment to the principles of the Constitution, and in open court take an oath renouncing his former allegiance and pledging future allegiance to the United States. At the final hearing in open court, he and his witnesses must be examined under oath, and the government may appear for the purpose of cross-examining in respect of "any matter touching or in any way affecting his right to admission," introduce countervailing evidence, and be heard in opposition.

In specifically requiring that the court shall be satisfied that the applicant, during his residence in the United States, has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, etc., it is obvious that Congress regarded the *fact* of good character and the *fact* of attachment to the principles of the Constitution as matters of the first importance. The applicant's behavior is significant to the extent that it tends to establish or negative these facts.

But proof of good behavior does not close the inquiry. Why does the statute require examination of the applicant and witnesses in open court and under oath, and for what purpose is the government authorized to cross-examine concerning any matter *touching* or in any way *affecting* the right of naturalization? Clearly, it would seem, in order that the court and the government, whose power and duty in that respect these provisions take for granted, may discover whether the applicant is fitted for citizenship;—and to that end, by actual inquiry, ascertain, among other things, whether he has intelligence and good character; whether his oath to support and defend the Constitution and laws of the United States, and to bear true faith and allegiance to the same, will be taken without mental reservation or purpose inconsistent therewith; whether his views are compatible with the obligations and duties of American citizenship; whether he will upon his own part observe the laws of the land; whether he is willing to support the government in time of war, as well as in time of peace, and to assist in the defense of the country, not to the extent or in the manner that he may choose, but to such extent and in such

manner as he lawfully may be required to do. These, at least, are matters which are of the essence of the statutory requirements, and in respect of which the mind and conscience of the applicant may be probed by pertinent inquiries, as fully as the court, in the exercise of a sound discretion, may conclude is necessary.

The settled practice of the courts having jurisdiction in naturalization proceedings has, from the beginning, been in accordance with this view. *In re Bodek*, 63 Fed. 813; *In re Meakins*, 164 Fed. 334; *In re Madurri*, 176 Fed. 465, 466; *In re Ross*, 188 Fed. 685; *United States* v. *Bressi*, 208 Fed. 369, 372; *Schurmann* v. *United States*, 264 Fed. 917, 920; *In re Sigelman*, 268 Fed. 217. And it finds support in the decisions of this court. As early as 1830, in *Spratt* v. *Spratt*, 4 Pet. 393, 407, Chief Justice Marshall, speaking for the court, said:

"The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact."

United States v. *Schwimmer*, 279 U. S. 644, 649.

With the foregoing statutory provisions and the scope of the powers and duties of the courts of first instance in respect thereof in mind, we come to a consideration of the case now before us. The applicant had complied with all the formal requirements of the law, and his personal character and conduct were shown to be good in all respects. His right to naturalization turns altogether upon the effect to be given to certain answers and qualifying statements made in response to interrogatories propounded to him.

Upon the preliminary form for petition for naturalization, the following questions, among others, appear: "20. Have you read the following oath of allegiance? [which is then quoted]. Are you willing to take this oath in becoming a citizen?" "22. If necessary, are you willing to take up arms in defense of this country?" In response to the questions designated 20, he answered "Yes." In response to the question designated 22, he answered, "Yes; but I should want to be free to judge of the necessity." By a written memorandum subsequently filed, he amplified these answers as follows:

"20 and 22. I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of humanity in

the long run. I do not undertake to support 'my country, right or wrong' in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not 'take up arms in defense of this country,' however 'necessary' the war may seem to be to the Government of the day.

"It is only in a sense consistent with these statements that I am willing to promise to 'support and defend' the Government of the United States 'against all enemies, foreign and domestic.' But, just because I am not certain that the language of questions 20 and 22 will bear the construction I should have to put upon it in order to be able to answer them in the affirmative, I have to say that I do not know that I can say 'Yes' in answer to these two questions."

Upon the hearing before the district court on the petition, he explained his position more in detail. He said that he was not a pacifist; that if allowed to interpret the oath for himself he would interpret it as not inconsistent with his position and would take it. He then proceeded to say that he would answer question 22 in the affirmative only on the understanding that he would have to believe that the war was morally justified before he would take up arms in it or give it his moral support. He was ready to give to the United States all the allegiance he ever had given or ever could give to any country, but he could not put allegiance to the government of any country before allegiance to the will of God. He did not anticipate engaging in any propaganda against the prosecution of a war which the government had already declared and which it considered to be justified; but he preferred not to make any absolute promise at the time of the hearing, because of his ignorance of all the circumstances which might affect his judgment with reference to such a war. He did not question that the government under certain conditions could regulate and restrain the conduct of the individual citizen, even to the extent of imprisonment. He recognized the principle of the submission of the individual citizen to the opinion of the majority in a democratic country; but he did not believe in having his own moral problems solved for him by the majority. The position thus taken was the only one he could take consistently with his moral principles and with what he understood to be the moral principles of Christianity. He recognized, in short, the right of the government to restrain the freedom of the individual for the good of the social whole; but

was convinced, on the other hand, that the individual citizen should have the right respectfully to withhold from the government military services (involving, as they probably would, the taking of human life), when his best moral judgment would compel him to do so. He was willing to support his country, even to the extent of bearing arms, if asked to do so by the government, in any war which he could regard as morally justified.

There is more to the same effect, but the foregoing is sufficient to make plain his position.

These statements of the applicant fairly disclose that he is unwilling to take the oath of allegiance, except with these important qualifications: That he will do what he judges to be in the best interests of the country only in so far as he believes it will not be against the best interests of humanity in the long run; that he will not assist in the defense of the country by force of arms or give any war his moral support unless he believes it to be morally justified, however necessary the war might seem to the government of the day; that he will hold himself free to judge of the morality and necessity of the war, and, while he does not anticipate engaging in propaganda against the prosecution of a war declared and considered justified by the government, he prefers to make no promise even as to that; and that he is convinced that the individual citizen should have the right to withhold his military services when his best moral judgment impels him to do so.

Thus stated, the case is ruled in principle by *United States* v. *Schwimmer, supra.* In that case the applicant, a woman, testified that she would not take up arms in defense of the country. She was willing to be treated on the basis of a conscientious objector who refused to take up arms in the recent war, and seemed to regard herself as belonging in that class. She was an uncompromising pacifist, with no sense of nationalism, and only a cosmic sense of belonging to the human family. Her objection to military service, we concluded, rested upon reasons other than her inability to bear arms because of sex or age; and we held that her application for naturalization should be denied upon the ground, primarily, that she failed to sustain the burden of showing that she did not oppose the principle making it a duty of citizens, by force of arms when necessary, to defend their country against its enemies. At page 650 we said:

"That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

"The common defense was one of the purposes for which the people ordained and established the Constitution. . . . We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws by armed citizens. This Court, in the *Selective Draft Law Cases,* 245 U. S. 366, speaking through Chief Justice White, said (p. 378) that 'the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need. . . .'

"Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the 'good order and happiness' of the United States can not long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others. It is clear from her own statements that the declared opinions of respondent as to armed defense by citizens against enemies of the country were directly pertinent to the investigation of her application."

And see *In re Roeper,* 274 Fed. 490; *Clarke's Case,* 301 Pa. 321.

There are few finer or more exalted sentiments than that which finds expression in opposition to war. Peace is a sweet and holy thing, and war is a hateful and an abominable thing to be avoided by any sacrifice or concession that a free people can make. But thus far mankind has been unable to devise any method of indefinitely prolonging the one or of entirely abolishing the other; and, unfortunately, there is nothing which seems to afford positive ground for thinking that the near future will witness the beginning of the reign of perpetual peace for which good men and women everywhere never cease to pray. The Constitution, therefore, wisely contemplating the ever present possibility of war, declares that one of its purposes is to "provide for the common defense." In express terms Congress is empowered "to declare war," which neces-

sarily connotes the plenary power to wage war with all the force necessary to make it effective; and "to raise . . . armies", which necessarily connotes the like power to say who shall serve in them and in what way.

From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams,—"This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life." To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war.

These are but illustrations of the breadth of the power; and it necessarily results from their consideration that whether any citizen shall be exempt from serving in the armed forces of the Nation in time of war is dependent upon the will of Congress and not upon the scruples of the individual, except as Congress provides. That body, thus far, has seen fit, by express enactment, to relieve from the obligation of armed service those persons who belong to the class known as conscientious objectors; and this policy is of such long standing that it is thought by some to be beyond the possibility of alteration. Indeed, it seems to be assumed in this case that the privilege is one that Congress itself is powerless to take away. Thus it is said in the carefully prepared brief of respondent:

"To demand from an alien who desires to be naturalized an unqualified promise to bear arms in every war that may be declared, despite the fact that he may have conscientious religious scruples

against doing so in some hypothetical future war, would mean that such an alien would come into our citizenry on an unequal footing with the native born, and that he would be forced, as the price of citizenship, to forego a privilege enjoyed by others. That is the manifest result of the fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so."

This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. The alien, when he becomes a naturalized citizen, acquires, with one exception, every right possessed under the Constitution by those citizens who are native born (*Luria* v. *United States*, 231 U. S. 9, 22); but he acquires no more. The privilege of the native born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. In *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29, this court, speaking of the liberties guaranteed to the individual by the Fourteenth Amendment, said:

". . . and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense."

The applicant for naturalization here is unwilling to become a citizen with this understanding. He is unwilling to leave the question of his future military service to the wisdom of Congress where it belongs, and where every native born or admitted citizen is obliged to leave it. In effect, he offers to take the oath of allegiance only with the qualification that the question whether the war is

necessary or morally justified must, so far as his support is concerned, be conclusively determined by reference to his opinion.

When he speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident, in the light of his entire statement, that he means to make *his own interpretation* of the will of God the decisive test which shall conclude the government and stay its hand. We are a Christian people (*Holy Trinity Church* v. *United States*, 143 U. S. 457, 470-471), according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a Nation with the duty to survive; a Nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.

The applicant here rejects that view. He is unwilling to rely, as every native born citizen is obliged to do, upon the probable continuance by Congress of the long established and approved practice of exempting the honest conscientious objector, while at the same time asserting his willingness to conform to whatever the future law constitutionally shall require of him; but discloses a present and fixed purpose to refuse to give his moral or armed support to any future war in which the country may be actually engaged, if, in his opinion, the war is not morally justified, the opinion of the Nation as expressed by Congress to the contrary notwithstanding.

If the attitude of this claimant, as shown by his statements and the inferences properly to be deduced from them, be held immaterial to the question of his fitness for admission to citizenship, where shall the line be drawn? Upon what ground of distinction may we hereafter reject another applicant who shall express his willingness to respect any particular principle of the Constitution or obey any future statute only upon the condition that he shall entertain the opinion that it is morally justified? The applicant's attitude, in effect, is a refusal to take the oath of allegiance except in an altered form. The qualifications upon which he insists, it is true, are made by parol and not by way of written amendment to the oath; but the substance is the same.

It is not within the province of the courts to make bargains with those who seek naturalization. They must accept the grant and take the oath in accordance with the terms fixed by the law, or forego the privilege of citizenship. There is no middle choice. If one qualification of the oath be allowed, the door is opened for others, with utter confusion as the probable final result. As this Court said in *United States* v. *Manzi*, 276 U. S. 463, 467:

"Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant."

The Naturalization Act is to be construed "with definite purpose to favor and support the Government," and the United States is entitled to the benefit of any doubt which remains in the mind of the court as to any essential matter of fact. The burden was upon the applicant to show that his views were not opposed to "the principle that it is a duty of citizenship, by force of arms when necessary, to defend the country against all enemies, and that [his] opinions and beliefs would not prevent or impair the true faith and allegiance required by the Act." *United States* v. *Schwimmer, supra*, 649, 650, 653. We are of opinion that he did not meet this requirement. The examiner and the court of first instance who heard and weighed the evidence and saw the applicant and witnesses so concluded. That conclusion, if we were in doubt, would not be rejected except for good and persuasive reasons, which we are unable to find.

The decree of the court of appeals is reversed and that of the district court is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 504.—October Term, 1930.

The United States, Petitioner, *vs.* Douglas Clyde Macintosh.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 25, 1931.]

Mr. Chief Justice Hughes, dissenting.

I am unable to agree with the judgment in this case. It is important to note the precise question to be determined. It is solely one of law, as there is no controversy as to the facts. The question is not whether naturalization is a privilege to be granted or withheld. That it is such a privilege is undisputed. Nor, whether the Congress has the power to fix the conditions upon which the privilege is granted. That power is assumed. Nor, whether the Congress may in its discretion compel service in the army in time of war or punish the refusal to serve. That power is not here in dispute. Nor is the question one of the authority of Congress to exact a promise to bear arms as a condition of its grant of naturalization. That authority, for the present purpose, may also be assumed.

The question before the Court is the narrower one whether the Congress has exacted such a promise. That the Congress has not made such an express requirement is apparent. The question is whether that exaction is to be implied from certain general words which do not, as it seems to me, either literally or historically, demand the implication. I think that the requirement should not be implied, because such a construction is directly opposed to the spirit of our institutions and to the historic practice of the Congress. It must be conceded that departmental zeal may not be permitted to outrun the authority conferred by statute. If such a promise is to be demanded, contrary to principles which have been respected as fundamental, the Congress should exact it in unequivo-

cal terms, and we should not, by judicial decision, attempt to perform what, as I see it, is a legislative function.

In examining the requirements for naturalization, we find that the Congress has expressly laid down certain rules which concern the opinions and conduct of the applicant. Thus it is provided that no person shall be naturalized "who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specified individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist". Act of June 29, 1906, c. 3592, § 7; 34 Stat. 596, 598; U. S. C. Tit. 8, § 364. The respondent, Douglas Clyde Macintosh, entertained none of these disqualifying opinions and had none of the associations or relations disapproved. Among the specific requirements as to beliefs, we find none to the effect that one shall not be naturalized if by reason of his religious convictions he is opposed to war or is unwilling to promise to bear arms. In view of the questions which have repeatedly been brought to the attention of the Congress in relation to such beliefs, and having regard to the action of the Congress when its decision was of immediate importance in the raising of armies, the omission of such an express requirement from the naturalization statute is highly significant.

Putting aside these specific requirements as fully satisfied, we come to the general conditions imposed by the statute. We find one as to good behavior during the specified period of residence preceding application. No applicant could appear to be more exemplary than Macintosh. A Canadian by birth, he first came to the United States as a graduate student at the University of Chicago, and in 1907 he was ordained as a Baptist minister. In 1909 he began to teach in Yale University and is now a member of the faculty of the Divinity School, Chaplain of the Yale Graduate School, and Dwight Professor of Theology. After the outbreak of of the Great War, he voluntarily sought appointment as a chaplain with the Canadian Army and as such saw service at the front. Returning to this country, he made public addresses in 1917 in support

of the Allies. In 1918, he went again to France where he had charge of an American Y. M. C. A. hut at the front until the armistice, when he resumed his duties at Yale University. It seems to me that the applicant has shown himself in his behavior and character to be highly desirable as a citizen and, if such a man is to be excluded from naturalization, I think the disqualification should be found in unambiguous terms and not in an implication which shuts him out and gives admission to a host far less worthy.

The principal ground for exclusion appears to relate to the terms of the oath which the applicant must take. It should be observed that the respondent was willing to take the oath, and he so stated in his petition. But, in response to further inquiries, he explained that he was not willing "to promise beforehand" to take up arms, "without knowing the cause for which my country may go to war" and that "he would have to believe that the war was morally justified". He declared that "his first allegiance was to the will of God"; that he was ready to give to the United States "all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God." The question then is whether the terms of the oath are to be taken as necessarily implying an assurance of willingness to bear arms, so that one whose conscientous convictions or belief of supreme allegiance to the will of God will not permit him to make such an absolute promise, cannot take the oath and hence is disqualified for admission to citizenship.

The statutory provision as to the oath which is said to require this promise is this: "that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same". Act of June 29, 1906, c. 3592, § 4, 34 Stat. 596, 598; U. S. C. Tit. 8, § 381. That these general words have not been regarded as implying a promise to bear arms notwithstanding religious or conscientious scruples, or as requiring one to promise to put allegiance to temporal power above what is sincerely believed to be one's duty of obedience to God, is apparent, I think, from a consideration of their history. This oath does not stand alone. It is the same oath in substance that is required by Act of Congress of civil officers generally (except the President, whose oath is prescribed by the Constitution). The Congress, in prescribing such an oath

for civil officers, acts under Article VI, section 3, of the Constitution, which provides: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a Qualification to any Office or public Trust under the United States". The general oath of office, in the form which has been prescribed by the Congress for over sixty years, contains the provision "that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion." (R. S., § 1757, U. S. C., Tit. 5, § 16). It goes without saying that it was not the intention of the Congress in framing the oath to impose any religious test. When we consider the history of the struggle for religious liberty, the large number of citizens of our country from the very beginning, who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God, I find it impossible to conclude that such persons are to be deemed disqualified for public office in this country because of the requirement of the oath which must be taken before they enter upon their duties. The terms of the promise "to support and defend the Constitution of the United States against all enemies, foreign and domestic," are not, I think, to be read as demanding any such result. There are other and most important methods of defense, even in time of war, apart from the personal bearing of arms. We have but to consider the defense given to our country in the late war, both in industry and in the field, by workers of all sorts, by engineers, nurses, doctors and chaplains, to realize that there is opportunity even at such a time for essential service in the activities of defense which do not require the overriding of such religious scruples. I think that the requirement of the oath of office should be read in the light of our regard from the beginning for freedom of conscience. While it has always been recognized that the supreme power of government may be exerted and disobedience to its commands may be punished, we know that with many of our worthy

citizens it would be a most heart-searching question if they were asked whether they would promise to obey a law believed to be in conflict with religious duty. Many of their most honored exemplars in the past have been willing to suffer imprisonment or even death rather than to make such a promise. And we also know, in particular, that a promise to engage in war by bearing arms, or thus to engage in a war believed to be unjust, would be contrary to the tenets of religious groups among our citizens who are of patriotic purpose and exemplary conduct. To conclude that the general oath of office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of the Congress but as repugnant to the fundamental principle of representative government.

But the naturalization oath is in substantially the same terms as the oath of office to which I have referred. I find no ground for saying that these words are to be interpreted differently in the two cases. On the contrary, when the Congress reproduced the historic words of the oath of office in the naturalization oath, I should suppose that, according to familiar rules of interpretation, they should be deemed to carry the same significance.

The question of the proper interpretation of the oath is, as I have said, distinct from that of legislative policy in exacting military service. The latter is not dependent upon the former. But the long-established practice of excusing from military service those whose religious convictions oppose it confirms the view that the Congress in the terms of the oath did not intend to require a promise to give such service. The policy of granting exemptions in such cases has been followed from colonial times and is abundantly shown by the provisions of colonial and state statutes, of state constitutions, and of acts of Congress. See citations in the opinion of the Circuit Court of Appeals in the present case. 42 Fed. (2d) 845, 847, 848. The first constitution of New York, adopted in 1777, in providing for the state militia, while strongly emphasizing the duty of defense, added "That all such of the inhabitants of this state (being of the people called Quakers) as, from scruples of conscience may be averse to the bearing of arms, be therefrom excused by the legislature, and do pay to the state such sums of money, in lieu of their personal service, as the same

may, in the judgment of the legislature, be worth.'" Art XL. A large number of similar provisions are found in other States. The importance of giving immunity to those having conscientious scruples against bearing arms has been emphasized in debates in Congress repeatedly from the very beginning of our government, and religious scruples have been recognized in draft acts. Annals of Congress (Gales), 1st Congress, vol. I, pp. 434, 436, 729, 731; vol. II, pp. 1818-1827; Acts of February 24, 1864, 13 Stat. 6, 9; January 21, 1903, 32 Stat. 775; June 3, 1916, 39 Stat. 166, 197; May 18, 1917, 40 Stat. 76, 78. I agree with the statement in the opinion of the Circuit Court of Appeals in the present case that "This Federal legislation is indicative of the actual operation of the principles of the Constitution, that a person with conscientious or religious scruples need not bear arms, although as a member of society, he may be obliged to render services of a non-combatant nature".

Much has been said of the paramount duty to the State, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the State exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the State, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the State has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. As was stated by Mr. Justice Field, in *Davis* v. *Beason*, 133 U. S. 333, 342: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will." One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegance to the will of God. Professor Macintosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine. And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate

conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts. The Congress has sought to avoid such conflicts in this country by respecting our happy tradition. In no sphere of legislation has the intention to prevent such clashes been more conspicuous than in relation to the bearing of arms. It would require strong evidence that the Congress intended a reversal of its policy in prescribing the general terms of the naturalization oath. I find no such evidence.

Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power of Congress, the mere holding of religious or conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification.

Apart from the terms of the oath, it is said that the respondent has failed to meet the requirement of "attachment to the principles

of the Constitution". Here, again, is a general phrase which should be construed, not in opposition to, but in accord with, the theory and practice of our Government in relation to freedom of conscience. What I have said as to the provisions of the oath I think applies equally to this phase of the case.

The judgment in *United States* v. *Schwimmer*, 279 U. S. 644, stands upon the special facts of that case, but I do not regard it as requiring a reversal of the judgment here. I think that the judgment below should be affirmed.

Mr. Justice HOLMES, Mr. Justice BRANDEIS and Mr. Justice STONE concur in this opinion.